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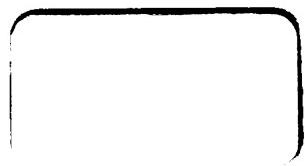
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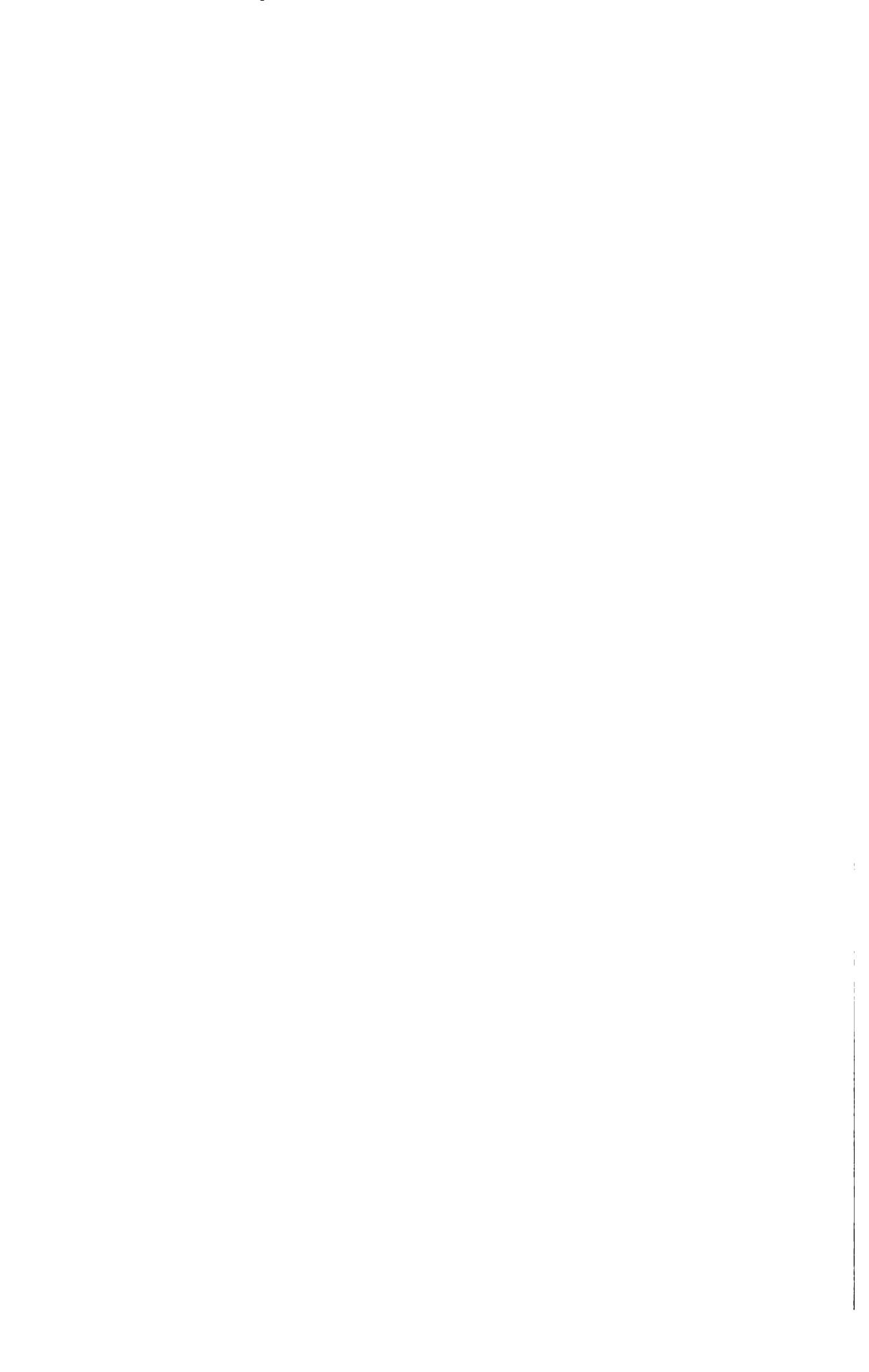
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ANNOUNCEMENT.

Beginning with this issue of the CENTRAL LAW JOURNAL we shall report in digest form all important English and Canadian decisions as they shall appear. We believe our subscribers will appreciate this service, which means to us not an inconsiderable additional expense. We should be fully compensated if you will let your appreciation take the form of a recommendation of the CENTRAL LAW JOURNAL to other members of your bar.

THE FAITH AND CREDIT CLAUSE OF THE CONSTITUTION RESPECTING DECREES AFFECTING REAL PROPERTY IN OTHER STATES.

The case of Fall v. Eastin, 30 Sup. Ct. 3, affirms the ruling of the Supreme Court of Nebraska, that a decree of divorce, granted in the state of Washington, was not required to be recognized under the faith and credit clause of the constitution, in so far as it attempts to convey land situated in the former state. This decision was dissented from *in toto* by Justices Harlan and Brewer, and the concurring opinion of Justice Holmes may also be classed as a dissent from the majority opinion, his special concurrence being based on an independent consideration.

It was conceded that there was complete jurisdiction of the parties upon personal service and appearance; that, by statute in Washington, the equities in all property of the parties could be settled by a decree in divorce; that in accordance with that statutory jurisdiction the Washington court decreed that said land should be conveyed

to the wife by the husband, and, he refusing to do so, a deed therefor was executed by a commissioner, appointed by the court for that purpose.

The express ruling of the Federal Supreme Court is, that the Washington decree "gave no such equities as could be recognized in Nebraska as justifying an action to quiet title," in so far as protection given to judgments of sister states by the faith and credit clause of the constitution is concerned. Neither Justice Harlan nor Justice Brewer wrote any opinion, and Justice McKenna, who spoke for the majority, introduces a concept in the words above quoted, which is nowhere discussed in the opinion, that is to say, confining the ruling to the form of action instituted. It is certain, from reading the opinion of Nebraska Supreme Court (75 Neb. 120, 121 Am. St. Rep. 767), that the form of action was not strictly considered, because that court gave plaintiff the right to recover for "taxes and interest and other outlays for the benefit of the property" paid out by her, showing relief is elastic in that state. Justice Holmes thought the "decree was entitled to full faith and credit in Nebraska," so far as establishing the wife's equity is concerned, but he conceived that the Nebraska court was entitled to say whether or not that equity affected the husband's grantee with notice.

It is useless to discuss the proposition whether the Washington decree could directly affect the title to the property involved. It is too plain that it could not. But this is not saying that the *situs* of property may prevent a court of equity from rendering a decree fixing the rights of parties in it and enforcing that decree by coercion *in personam*.

Both the Supreme Court of the United States and that of Nebraska concede this. The latter court expressed itself thus strongly on this feature: "We think there can be no doubt, where a court of chancery has, by its decree, ordered and directed persons properly within its jurisdiction to do or refrain from doing a certain act, it may compel obedience to this decree by appropriate proceedings, and that any action taken by

reason of such compulsion is valid and effectual wherever it may be assailed. In the instant case, if Fall had obeyed the order of the Washington court and made a deed of conveyance to his wife of the Nebraska land, even under the threat of contempt proceedings, or after duress by imprisonment, the title thereby conveyed to Mrs. Fall would have been of equal weight and dignity with that which he himself possessed at the time of the execution of the deed." The Federal Supreme Court appears to take this identical view, as it is said "obedience (in such cases) is compelled by proceedings in the nature of contempt, attachment or sequestration."

This position necessarily implies that, had Fall obeyed the decree by executing a deed, he could not in another state have had his conveyance set aside as obtained by duress, because under these circumstances the decree would be entitled to full faith and credit, the constitutional clause establishing "a rule of evidence rather than of jurisdiction." *Hanley v. Donoghue*, 116 U. S. 1. But the decree could excuse or justify the duress for one reason only, and that would be that it concerned, legally and rightfully, the title to the land in Nebraska.

We, therefore, have come to this point: If a court of chancery decrees, that one of two parties is entitled to land in another state and coerces the other into executing a deed to the former, that decree must be accorded full faith and credit in the other state under the faith and credit clause of the constitution, while if the coercion is unsuccessful or not attempted, it is not. This looks anomalous, because coercion would seem but an incidental thing and its success the consequence of conscience or cowardice, another incidental thing.

Considering that this is so, ought not the general principle, that a decree in one state cannot affect directly the title to property in another to be considered to mean, under the faith and credit clause, that it must be first established as a judgment in the court where the land lies? That being done, it can have process like any other foreign judgment, and that process must conform to the

lex fori. This was the view held in *Burnley v. Stevenson*, 24 Ohio St. 474, this case ruling that, because of the faith and credit clause, "the courts of this (Ohio) state cannot decree the performance of that (Kentucky) decree, by compelling the conveyance through its process of attachment, but when pleaded in our courts, as a cause of action, or as a ground of defense, it must be regarded as conclusive of all the rights and equities which were adjudicated and settled therein, unless it be impeached for fraud."

The opinion in this case cites several cases, but Justice McKenna dismisses them very summarily by saying he will not stop to review them, as the other view accords with the weight of authority. Strange to say, however, this equity idea is not alluded to at all in the cases referred to as being opposed to the Burnley case.

The case of *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, holds that "such a decree, although no conveyance has been executed, may be pleaded as a cause of action or as a ground of defense, in the courts of the state where the land is situated; and it is entitled, in the court, where so pleaded, to the force and effect of record evidence of the equities therein determined, unless it be impeached for fraud." Further on, as illustrating the idea of the failure of such a decree to affect directly the title to land in another state, it is said: "Or if such lands have been converted into money, or money realized therefrom * * * he can be compelled to account, either in law or equity, as the nature of accounts or the character of relief may require."

The Nebraska decision, however, so far as the majority opinion's silence and Justice Holmes' express disagreement with the Nebraska Supreme Court show, is something of a blow to the public-policy idea advanced by Nebraska court for refusing to enforce the decree. That court spoke of a domestic decree being a nullity under Nebraska statute forbidding the apportionment of real estate to the parties, and said: "We know of no rule which compels us to give to a decree of the courts of Wash-

ton a force and effect we would deny to a decree of our own courts upon the same cause of action." Mr. Justice Holmes said: "It does not matter to its constitutional effect what the ground of the decree may be, whether a contract or something else." He cited an opinion by himself, speaking for the majority in *Polson v. Stewart*, 167 Mass. 211, where it was held, that a covenant made by husband and wife in the state of their domicile to surrender all his marital rights in her lands, situated in another state, if valid where made, is valid in the state where such land is situated, though it would not have been valid had the parties been residents of that state.

But the vaunted declaration of not allowing a decree to affect title to foreign land—thus depriving a state of that exclusive control over its real estate which has always been accorded—seems an idle sort of vaporizing, in the face of the acknowledged principle which is thus stated in *Phelps v. McDonald*, 99 U. S. 298, 308: "When necessary parties are before a court of equity it is immaterial that the *res* of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal, for it has the power to compel one to do all things necessary, according to the *lex loci rei sitae*, which he could do voluntarily to give full effect to the decree against him." Therefore, all that the state is interested in is, that its manner or mode for the transfer of real estate is complied with, and that is all it pretends to be interested in.

A foreign decree, attempting to dispose of land, is no less a deprivation of a state's exclusive control over its real estate, when it compels a conveyance by a party under duress, than when it omits such compulsion. The real situation is, that a decree in equity, like a judgment at law, needs a new adjudication for extra-territorial enforcement. A court of equity has, in addition to that which a court of law has, a personal control over suitors, but this added power appears to have been treated as a defect, rather than a virtue, in equity jurisdiction.

NOTES OF IMPORTANT DECISIONS.

STATUTES—THE RULE OF EJUSDEM GENERIS.—The federal customs administration act prescribes penalties for its violation by "any owner, importer, consignee, agent or other person" in making entries of imported merchandise. A prosecution was begun against one rendering assistance to an importer who was the person making "the entry," it being claimed by the government that defendant came under the designation of "other person." *United States v. Mescal*, 30 Sup. Ct. 19.

Defendant claimed that under the rule of ejusdem generis the statute did not cover the offense charged. It was conceded that he did not come under the description "agent," etc.

Justice Brewer, arguing that as the old statute was amended by adding the words "other person," the descriptive terms were exhaustive, approves what was said in *National Bank v. Ripley*, 161 Mo. 126, 132, that "where the particular words exhaust the class, the general words must be construed as embracing something outside of that class."

The Justice further said: "The defendant was a person other than the owner, importer, consignee or agent, by whose act the United States was deprived of a portion of its lawful duties. This act comes within the letter of the statute, as well as within its purpose; and the intent of congress in the legislation is the ultimate matter to be determined."

This decision seems somewhat along the line of *United States v. Union Supply Co.*, commented on in this issue, as showing the disposition of the court to make every sort of rule bend to "intent," and both cases appear to be in opposition, in this way, to *Erbaugh v. United States*, 173 Fed. 433, also commented on in this issue.

CRIMINAL LAW—ENFORCEMENT OF PENAL SANCTION OF FINE AND IMPRISONMENT AGAINST CORPORATION.—The sixth section of the oleomargarine act requiring "wholesale dealers" in oleomargarine to keep certain books and make certain returns prescribes that "any person who wilfully violates any of the provisions of this section shall, for each such offense, be fined not less than fifty dollars, and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months."

It was contended in *United States v. Union Supply Co.*, a corporation, 30 Sup. Ct. 15, first, that the fact that a form of punishment was prescribed which is, in part impossible of enforcement against a corporation, showed, that such was not "a person" within the

meaning of the section, and, secondly, that if the section was aimed at corporations as well as natural persons, that this impossibility of enforcement, as to an indivisible part of the punishment, made the section nugatory as to corporations.

The first contention was overruled by reasoning showing in what respect this section was amended and how its earlier form, certainly applicable to corporations, presumptively remained unchanged in this respect, this being deemed so evident, that the force of this contention was considered to be overcome.

The second contention presents a broader question, but its treatment, too, is rather special in the opinion of Justice Day speaking for the court.

The opinion thus speaks on this subject: "If the defendant escapes, it does so on the single ground, that, as it cannot suffer both parts of the punishment it need not suffer one. It seems to us that a reasonable interpretation of the words used does not lead to such a result. If we compare sec. 5, the application of one of the penalties rather than of both is made to depend, not on the character of the defendant, but on the discretion of the judge; yet, there, corporations are mentioned in terms. See Hawke v. E. Hulton & Co. (1909) 2 K. B. 93, 98. And if we free our minds from the notion, that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean on that account, to let the defendant escape." To this is cited the Hulton Co. case, *supra*, and a Kentucky case.

Naturally one might ask why we should "free our minds" as suggested, if we are abandoning a legal principle, which ordinarily obtains? To us this ruling looks at least like putting the door ajar, not to say opening it, for the sort of evil, which generally subjects law to the individual conception of judges uncontrolled by canons of construction. If Congress made a botch of this statute, it ought to go by the board, and it seems to us better to kill a bad statute, than to set up a bad precedent.

CRIMINAL LAW—USING MAILED TO EFFECT A FRAUDULENT SCHEME.—The federal statute prohibits the effecting of any scheme or artifice to defraud "by opening or intending to open any correspondence or communication with any person by means of the postoffice establishment."

This looks like a broad provision sufficient to cover any artifice thus aided, but the in-

genuity of a defendant in Colorado appears to have devised such an artifice and to have used the mails for its accomplishment without bringing himself within its terms. Erbaugh v. United States, 173 Fed. 433.

It appears that the indictment charged the defendant with having devised a scheme to defraud, which he "intended to effect by opening correspondence with himself under an assumed and fictitious name by means of the post office establishment."

Judge Sanborn said: "The obvious and common meaning of opening or intending to open correspondence with a person imports distance between him who opens or intends to open it and his intended correspondent, which renders the use of the mails convenient or necessary, and that his correspondent is some other person than himself, for one cannot open correspondence with himself by means of the post-office establishment by writing and sending letters to himself through the mails, because the communication with himself in such a case must necessarily be opened and intended to be opened when the letter is written and before it is mailed."

That sounds quite metaphysical, and we are not sure we follow the learned judge. Though it is opened and intended to be opened when the letter is written, and before it is mailed," it is intended to be opened again after it has been mailed, and the former opening or intended opening is a something wholly immaterial. The ordinary and obvious sense is certainly, as the court says, but is it the exclusive sense, the purpose being to prevent correspondence—that is letters sent—through the mails from becoming the basis of entering into a scheme to perpetrate a fraud.

The court does not seem entirely satisfied with its conclusion, for it further says: "The offense denounced by section 5480 is severe and a penal statute should be strictly construed." But here is the purpose defined and use of the mails is described, and the description of the means does not demand a severe literalness. We rather believe the indictment should not have spoken of a fictitious person, and the defendant have been compelled to prove that as part of his case. In that case it would be a question whether or not it was competent to show that fact.

But it seems to us the indictment was good, because in the sense of the statute correspondence is letters sent through the mails, and it is immaterial whether the recipient is also the sender or not.

PLEADING ESTOPPEL UNDER THE GENERAL ISSUE—A CRITICISM OF THE CASE OF BALSEWICZ v. CHICAGO, BURLINGTON & QUINCY RAILROAD.

In the comparatively recent case of Balsewicz v. Chicago, Burlington & Quincy Railroad,¹ it appeared that B., eighteen years old, was killed at the residence of his parents at Kewanee in Bureau County, a county remote from Chicago, which city is in the County of Cook. B. had no residence in Cook County, nor did he have any property therein. However, one W. fraudulently and without any right whatever, by some chicanery, got letters of administration from the Probate Court in Chicago, and upon these made a purported settlement with the railroad and gave it a release. The father in the meantime properly received letters where only they could lawfully be issued, namely, in Bureau County, and thereafter sued in that county and recovered a judgment for the death. This judgment was affirmed by the Court of Appeals, and was then carried to the Supreme Court, which was composed of both Cokes and Bacons. There, by a divided court, the judgment was reversed, upon these grounds:

The railroad pleaded the general issue (thus it seems they denied all the facts). Under that issue, it offered a release in evidence; this release was given under the assumed authority of the above named W., who had received the pretended letters of administration from the Probate Court in Chicago. This court had no territorial jurisdiction as the decedent did not live in Cook County, but in Bureau County, through which the railroad ran, and where the death was caused; decedent lived therein with his parents. Beside this, W. had no authority whatever to apply for letters anywhere. All that was known of W. was that it appeared that he called on the railroad and settled the damages, and gave a release and then vanished.

This release was admitted in evidence under the general issue, and was held in the Supreme Court to be decisive of the case. In other words, the release operated as an estoppel of record, although estoppels are odious and must be pleaded, agreeably to the rule that an authority must be pleaded. But in this case the mere letters of administration were held conclusive upon the father, the appellee. This appellee and all in privity with him were free of all fault, free of fraud, free of negligence, free of ignorance.

Estoppel is from the Roman civil law, and is a part of that law along with equity. Now one of the maxims of equity is that "Equity looks at substance and not form;" and so this maxim is expressed and vindicated in the rules of pleading and proving all the estoppels, and especially estoppel of record.

Many cases in Illinois hold that where the judgment or order of a court is relied upon to prove an estoppel or title to property, that then the authority to enter the judgment or order must be pleaded, and if the allegations are denied, they must be proved. From a statement of the facts of the case it is an inevitable inference that the plaintiff was extremely astonished to learn in a trial in Bureau County what the Probate Court in Chicago had done. And all of this iniquity concealed and masked under the "general issue." Nothing could be more at variance with fundamental law—the principles of equity and its cognate principles in res adjudicata or estoppel of record.

There are many decisions in Illinois emphasizing the importance of notice to the adverse side to prevent surprise. The Municipal Court Act for Chicago also emphasizes the requirement of notice for "trial purposes."

It must be conceded that there are liberal intendments to uphold a judgment for some purposes and at certain stages, e. g., when a judgment is sued upon in debt. But it is not conceded that when a judicial proceeding is desired to operate as an estoppel, and close one's mouth from speaking the truth, that such liberal intendment can be invoked. Estoppels are odious when they are not pleaded, and when they are odious, the presumption of regularity cannot apply.

Where a litigant sues on a judgment, he necessarily pleads it, so that his opponent has notice of what he is expected to meet, and ample opportunity to plead and prove the invalidity of the judgment, if he can. There, intendments in favor of the judgment may well be indulged. But the case is very different where the pleadings, as in the Balsewicz case, do not apprise the opposite party, that a judgment is being relied on as having settled any of the issues in the case. The father of the deceased, went into the trial of his case, not knowing of the existence even, of the alleged order of the Chicago Probate Court, much less having had an opportunity to examine the record on which it was based, and thus ascertain whether it was valid. In such a case, it is a manifest call of justice, that if the railroad is allowed to introduce its release at all, it be compelled to introduce the entire record of the Chicago Probate Court, on which the validity of the release rested.

To hold that this release could be sprung on plaintiff without notice, and that it thereupon devolved upon him to prove its invalidity, is the acme of injustice. It is to require the impossible. It is to put the unfortunate litigant in a hopeless trap.

Liberal intemds should not attach to make pleadings an instrument of chicane and covine, instead of servitors of justice. Liberal intemds are for convenience, and to advance the due administration of the laws, but they should never be employed to reverse the maxim: "Fraud vitiates all into which it enters." *Ex dolo malo non oritur actio* is also from the Roman civil law, and in judicial proceedings it has no exceptions, unless the case under consideration constitutes one.

The Roman civil law—its equity—its maxims—its principles—is the law throughout America. Another of these maxims is *De non apparentibus et non existentibus eadem est ratio*: What is not judicially presented cannot be judicially considered. This maxim relates to the mandatory, the common law record. The force and effect of this record depend upon the facts expressed and set forth in it. There are no intemds in favor of the establishment of jurisdictional facts; where a court must proceed upon facts, they must be shown to exist before any court can sequester or destroy one's rights.

It is true there is another, and at first blush contradictory maxim from the Roman civil law, and one which the Illinois Court is quite familiar with, judging from cases like *Harrod v. Grogan* (1906). This maxim is: *Omnia praesumuntur rite et solleniter esse acta*: All things are presumed to be rightly, regularly and validly done. But this maxim is of secondary importance, and is one of convenience, rather than of protection. It rightly applies to the acts of a court, after jurisdiction has been shown to exist. All subsequent steps in the case are presumed "solleniter et rite esse acta."

The maxim: "Estoppels are odious and are strictly taken," on the other hand, is one of protection, and should not be frittered away on light grounds.

Were the maxims of the Roman civil law better understood, and more frequently applied, there would be fewer such failures of justice as in this Balsewicz case. It ought to be noted, however, that Farmer and Vickers, JJ., dissented from the majority opinion of the Supreme Court.

EDWARD D'ARCY.

St. Louis.

DISCHARGE OF COVENANT AGAINST ASSIGNMENT.—DUMPER'S CASE.

In the absence of an express restriction, either by contract or by statute, the right of a tenant to assign his leasehold estate is incident to every tenancy.¹ But no rule of public policy prohibits the lessor from restricting or absolutely taking away by provisions in the lease the general right of a tenant to assign his term.²

A prohibition of assignment is generally effected by a covenant on the part of the tenant not to assign and a further provision for a forfeiture of the lease for breach of the covenant. The provision for a forfeiture is very essential to the full protection of the lessor, as, in case of a mere covenant not to assign without a provision for re-entry or forfeiture, the assignment itself is valid, and the lessee is merely liable for damages for breach of the covenant.³ And where the lease only prohibits an assignment without the lessor's consent, not providing for a forfeiture or re-entry, it has been held that the assignee may sue the lessor for possession of the premises.⁴ In the case of *Den v. Post*,⁵ the court said: "No ejectment can be maintained by the landlord for a mere breach of covenant, not coupled with a proviso for re-entry. His only remedy would be an action for breach of covenant. Neither the lease nor the assignment is avoided by reason of the breach of covenant."⁶ In the case of *Doe v. Goodwin*,⁷ the lease contained a provision against assignment, and also a provision for forfeiture on breach of other covenants, and it was held that there

(1) *Nave v. Berry*, 22 Ala. 382; *State v. McCauley*, 15 Cal. 429; *Barnes v. Trust Co.*, 169 Ill. 112; *King v. Lawson*, 98 Mass. 309.

(2) *Phila. etc. R. Co. v. Catawissa Ry. Co.*, 58 Pa. St. 20; *Doe v. Carter*, 8 T. R. 61; *Hargrave v. King*, 40 N. Car. 480.

(3) *Randal v. Tatum*, 98 Cal. 390; *Garcia v. Gunn*, 119 Cal. 315; *Shumway v. Collins*, 6 Gray (Miss.), 227; *Chautauqua v. Alling*, 46 Hun, 582.

(4) *Den v. Post*, 1 Dutch, 289.

(5) 1 Dutch, 289.

(6) Cited and quoted in 98 Cal. 398.

(7) 4 M. & S. 265.

was no right of re-entry for breach of the provision against assignment, and that it did not create a condition, but a covenant merely. This view was also taken in *Crawley v. Price*,⁸ also in *Lymde v. Hough*,⁹ in which case it was held that by a strict and literal interpretation of the covenant not to let or underlet the demised premises without the written consent of the landlord, under penalty of forfeiture and damages, it did not include an assignment by the lessee of all his right and interest in the lease. The ruling of the court in the case of *Field v. Mills*¹⁰ was also to the same effect.

An assignment is not void, however, which is made without the consent of the lessor. It is only voidable at the option of the lessor.¹¹ To constitute a breach of a covenant not to assign, a valid assignment, carrying the legal estate, is necessary.¹²

An Assignment With the Lessor's Consent Discharges the Covenant Against Assignment.—Where the lessee once assigns with the consent or license of the grantor or lessor, the covenant against assignment is determined or discharged, and a subsequent assignment or alienation by the assignee is not a breach of the condition against assignment, and will give no right of re-entry to the lessor, although there is a proviso in the lease for the same.¹³

(8) *L. R.* 10 Q. B. 302.

(9) 27 Barb. (N. Y.) 415.

(10) 23 N. J. L. 254.

(11) *Chipman v. Emeric*, 5 Cal. 49; 2 Am. & Eng. Enc. Law, 1048.

(12) *Peebles v. Crosthwaite*, 13 Times L. Rep. 198. See *Gentle v. Faulkner*, 68 L. J. Q. B. 348; *Richards v. Crawshay*, 8 Times L. Rep. 446.

(13) *Chipman v. Emeric*, 5 Cal. 49; *Brummel v. McPherson*, 14 Ves. Jr. 178; *Leeds v. Compton*, 1 Roll's Abr. 472; *Jones v. Jones*, 12 Ves. Jr. 186; *Macher v. Hospital*, 1 Ves. & B. 188; *Doe v. Pritchard*, 5 B. & Ad. 781; *Kew v. Trainer*, 50 Ill. App. 629; *Dougherty v. Matthews*, 35 Mo. 520; *Murray v. Harway*, 56 N. Y. 387; *Siefke v. Koch*, 31 How. Pr. (N. Y.) 388; *Heater v. Eckstein*, 50 How. Pr. 445; *Chalker v. Same*, 1 Conn. 91; *McCormack v. Stowell*, 133 Mass. 431; *Penock v. Lyons*, 118 Mass. 92; *West v. Robb*, 9 Best & Smith, 755; 1 Wood, Land. & Ten. (2nd Ed.), Secs. 276, 320; 1 Taylor, Land. & Ten. (8th Ed.), Sec. 286; *Emerson v. Simpson*, 43 N. H. 475; *Hansen v. Maier*, 81 Ill. 321; *Voris v. Renshaw*, 49 Ill. 425; *Bakin v. Williams*, 17 Wend. (N. Y.) 448; *Doe v. Bliss*, 4 Taunt, 785; *Sharon Iron Co. v. City*, 41 Pa. St. 341; *Dickey v. McCollough*, 2 W. & S. (Pa. St.) 88.

In the case of *Chipman v. Emeric*,¹⁴ decided by the Supreme Court of the State of California, the lease contained a clause that the lessee should not assign to any person without obtaining the consent of the grantor or lessor. The lessee made an assignment to Emeric with the consent of the lessor. Afterwards, and before the commencement of the action, Emeric, the said assignee, assigned and delivered possession to one Hibbard. Thereupon the lessor contended that the lease was void for the reason that said assignment to Hibbard was without the consent of the lessor. The court, in passing upon this case, said: "The court below found as a fact that Peralta, the first grantor, had consented to the assignment of the lease to Emeric. This, if it was even necessary, is sufficient to abrogate a covenant against assignment. It is questionable whether, in any case, such a covenant would be enforced so as to produce forfeiture. It is in restraint of alienation and therefore against the policy of the law."

In the case of *McCormack v. Stowell*,¹⁵ the Supreme Court of Massachusetts said: "The covenant by the lessee that he or others having an estate in the premises will not assign this lease without the written consent of the lessor, does not by its true construction extend so far as to prohibit a re-assignment to the lessee himself without a new and special consent of the lessor." And in the case of *Kew v. Trainer*,¹⁶ decided in 1893 by the Illinois court, it was said: "Ever since Dumper's case (1 Smith Lead. Cases, 119), although with many shadings, it has been the law, where not cured by statute, that a condition not to alien without license is determined by an alienation under the first license granted, and no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor."

Involuntary Assignment.—No breach of a general covenant not to assign is constituted by an involuntary assignment by oper-

(14) 5 Cal. 49.

(15) 133 Mass. 431.

(16) 50 Ill. App. 629.

ation of law, such as the transfer of the term to the personal representatives of the lessee on his death, and the subsequent assignment thereof by them in the administration of the lessee's estate.¹⁷ In the case of *Sears v. Hind*,¹⁸ it was held that the executor may dispose of the lease for years as an asset, notwithstanding a proviso or covenant that the lessee shall not alien.

In *Charles v. Byrd*,¹⁹ the Supreme Court of South Carolina had under consideration a lease containing the following provision: "This lease is not transferrable without Mrs. Charles' consent." Mrs. Charles was the lessor and Mr. Byrd the lessee. After entering into possession of the premises under this lease Byrd departed this life, leaving a widow, the respondent. Letters of administration were granted to Mrs. Byrd. Thereafter Mrs. Byrd was notified by the lessor to quit and was sued for possession of the premises. Mrs. Byrd defended on the ground that by operation of law the lease of said premises had vested in her as administratrix of the estate of the lessee, and that she was entitled to hold the same. The court said: "If, then, this agreement must be regarded as a lease for a term of years, creating a leasehold estate in the lessee, it is well settled that, upon the death of the lessee during the term, such estate vested in his executor or administrator, as the case may be, unless there is some provision in the lease stipulating for its termination upon the happening of such an event. * * * A lease for years to A, without naming executors or administrators, would, by operation of law, upon his death vest in his executor or administrator, and no words of limitation could alter the succession. * * * It will be observed that there is no provision in this agreement by which the breach of any of its covenants shall work forfeiture of the lease or determine its duration by limitation or otherwise, and therefore a question might be

raised whether a failure on the part of the lessee to comply with any of the stipulations would work a forfeiture or operate as a limitation upon the duration of the lease, or would simply subject the lessee to an action for damages for a breach of covenant. But waiving that question, and assuming that a breach of the provision of the eleventh clause, by an alienation of the lease, would either work a forfeiture of the lease, or determine its duration by way of conditional limitation, the question still remains whether the mere fact that by the death of the lessee, the lease has descended to and become vested in his administratrix by operation of law, is such an alienation as would effect that result. In 2 Williams on Executors, 676, it is said: 'If a lease be made for a term of years upon condition that if the lessee shall assign his term without the assent of the lessor, it shall be lawful for the lessor to re-enter, the term shall nevertheless vest in the executor or administrator of the lessee, without any breach of such condition.' And in a note to *Pilpot v. Hoare*, 2 Atk. 219, it is said upon the authority of several cases there cited: 'It seems settled that the mere act of a lease vesting in an assignee by operation of law can never be considered as a forfeiture under the proviso or covenant not to assign; for if such act of vesting should be considered a breach, the lease must, in fact, determine by the death of the lessee, which could never be the intention of the parties unless so particularly expressed.' Continuing, the court said: 'If the lessor desires to prevent alienation or transfer of any kind whether voluntary, or involuntary, it is perfectly competent, as it was held in *Roe v. Galleries*, supra., for him to do so by inserting an express provision to that effect in the lease; but in the absence of any provision, a general covenant that the lease shall not be assigned will not be regarded as broken by alienation in *invitum*, but only by a voluntary transfer.'

(17) *Sears v. Hind*, 1 Ves. Jr. 295; *Roe v. Harrison*, 2 T. R. 425; *Charles v. Byrd*, 29 S. C. 544; *Lee v. Lorsch*, 37 U. C. Q. B. 262.

(18) 1 Ves. Jr. 295.

(19) 29 S. C. 544.

It has also been held that an assignment through the bankruptcy or insolvency of

the lessee,²⁰ or the sale of the leasehold estate on execution against the lessee,²¹ or a sale on foreclosure of a mortgage on the leasehold,²² is not a breach of a general covenant against assignment. And this is true of a bequest of the term by the lessee.²³

On the other hand, an assignment by the lessee for the benefit of his creditors is treated as a voluntary assignment, and constitutes a breach of the covenant not to assign,²⁴ and so is an assignment by one co-lessee of his interest to the other co-lessee.²⁵ A mortgage of the leasehold, in those jurisdictions in which a mortgage carries the legal estate, has been held to be a breach of the covenant against assignment,²⁶ but an equitable mortgage by deposit of the lease is not a breach,²⁷ nor is a legal mortgage a breach in those jurisdictions in which a mortgage is considered merely a security, and not as conveying an estate.²⁸ Agreements creating simply an equitable charge upon the leasehold are held to constitute no breach.²⁹

DUMPER'S CASE.

Dumper's case,³⁰ decided in the reign of Queen Elizabeth, is the first recorded case upon the question of the abrogation of the clause against assignment by the consent of the lessor to the first assignment. This

(20) *Allen v. Bennett*, 1 Fed. Cases No. 214; *Bemis v. Wilder*, 100 Mass. 446; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Smith*, 5 Taunt 795; *Elplimstone v. Monkland*, 11 App. Cases, 332.

(21) *Riggs v. Pursell*, 66 N. Y. 193; *Jackson v. Kipp*, 3 Wend. (N. Y.) 230; *Medinah v. Curry*, 58 Ill. App. 433; *Farnum v. Hefner*, 79 Cal. 575; *Doe v. Carter*, 8 T. R. 57.

(22) *Riggs v. Pursell*, 66 N. Y. 193.

(23) *Doe v. Bevan*, 3 M. & S. 361; *Crusoe v. Bugby*, 3 Wils. C. Pl. 237; *Fox v. Swann*, Style 482.

(24) *Medinah, etc., v. Curry*, 162 Ill. 441. See *Gentle v. Faulkner*, 81 L. T. N. S. 294; *Magnée v. Rankin*, 29 U. C. Q. B. 259.

(25) *Varley v. Coppard*, L. R. 7 C. P. 505. See *Randol v. Scott*, 110 Cal. 590.

(26) *Becker v. Werner*, 98 Pa. St. 555.

(27) *Doe v. Hogg*, 4 Dow. & R. 226; *Doe v. Bevan*, 3 M. & S. 353; *Doe v. Laming*, R. & M. 36; *Ex p. Drake*, 1 Mont. D. & De G. 539; *Ex p. Cocks*, 2 Deac. 14; *McKay v. McNally*, 4 L. R. 428.

(28) *Trimm v. Marsh*, 54 N. Y. 599; *Riggs v. Pursell*, 66 N. Y. 193.

(29) *Bowser v. Coleby*, 5 Jur. 1106.

(30) 1 Smith's Lead. Cases, 119.

case was declaratory of the common law in England, and was the law upon the subject in England until the doctrine was changed by statute enacted in the early part of the reign of Queen Victoria. Therefore, since Dumper's case has been followed as an authority in the United States the question might arise whether the decisions of the American courts, founded upon the Dumper case, will be affected by the Act of the English Parliament.³¹

As was stated above, Dumper's case was declaratory of the common law, and common law is a system of Anglo-Saxon jurisprudence derived from custom and usage, and is evidenced by books written by men learned in the law, and by the judicial records of the courts of justice of England.³² In the case of *Forbes v. Scannel*,³³ the Supreme Court of the State of California said: "We understand by the 'common law' that general body of law which, as Judge Marshall expresses it, is constituted 'by those general principles and those general usages which are to be found, not in the legislative acts of any particular state, but that generally recognized and long established law which forms the substratum of the laws of every state.' We may look to American as well as English books, and to American as well as to English jurists, to ascertain what this law is, for neither the opinions nor precedents of judges can be said, with strict propriety, to be the law—they are only evidence of law." Chancellor Kent said: "The reports of judicial decisions contain the most certain evidence and the most authoritative and precise application of the rules of common law."³⁴

Dumper's case being one of first impression, and not based on any statute, was declaratory of the common law upon the particular question at hand. Dumper's case,

(31) This very question arose in an action in which the writer was counsel for one of the parties, but unfortunately the case was amicably adjusted before the decision of the court upon this question was had.

(32) 1 Bl. Com. 64-83; *State v. Buchanan*, 5 Har. & J. (Md.) 317.

(33) 18 Cal. 285.

(34) 1 Kent. Com. 473.

along with the other great body of English common law, was brought to this country at the time of the immigration; and since it has been held that all decisions, rendered prior to the Revolution, form part of the common law of the states and are binding on the American courts,⁸⁵ dumper's case must be treated as part of the common law of this country. The common law, as evidenced by treatises and decisions, was adopted in almost all of the American states at one time or another. The Supreme Court of California⁸⁶ said that the common "law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statutes."⁸⁷ Speaking of the modification of the common law by statute, no one, it is believed, will have the hardihood to contend that a state court will hold itself bound by a statute of another state, to say nothing of an Act of the Parliament of Great Britain, when passing upon the rights of citizens arising within the jurisdiction of a given state. Acts of Parliament of a general nature, or declaratory of the common law, enacted prior to July 4th, 1776, were declared to be the law of the American States. In some of the states, notably Colorado, Illinois, Indiana, New York, Virginia, Wyoming, Arkansas, Pennsylvania, and Ohio, it is held that all statutes and acts of the English Parliament enacted after the fourth year of James I. are without force and effect in their jurisdictions. But the two dates, viz: July 4th, 1776, and the fourth year of James I., have been adopted by the American States as the time when English statutes shall cease to affect the common law.⁸⁸

Therefore none of the statutory reforms introduced in England since July 4th, 1776, and the fourth year of James I., affecting the common law of England can obtain in

(85) Roberts v. Weat, 15 Ga. 122; State v. Buchanan, 5 Har. & J. (Md.) 317; Cox v. Morrow, 14 Ark. 603.

(86) Van Maren v. Johnson, 15 Cal. 808, 812.

(87) Lux v. Haggins, 69 Cal. 255, 287.

(88) 6 Am. & Eng. Enc. of Law, 278, 279.

this country. Said the Supreme Court of Illinois: "From that period (the adoption of the common law) we must look to American legislation and the reports of American courts for improvements and modifications in the common law."⁸⁹ And it has been held that where a decision turns upon the construction of the common law in a sister state, the court will follow its own precedents in expounding the rules of the common law applicable to a given transaction.⁹⁰

O. H. MYRICK.

Los Angeles, Cal.

(89) Penny v. Little, 4 Ill. 301.

(40) St. Nicholas Bank v. Bank, 128 N. Y. 26; Falkner v. Hart, 83 N. Y. 418; Ray v. Gas Co., 138 Pa. St. 576.

VENDOR AND PURCHASER—QUIT CLAIM DEED.

DOWNS v. RICH.

Supreme Court of Kansas, Nov. 6, 1909.

A purchaser of real estate by warranty deed whose grantor holds by quit claim deed only will be regarded as a purchaser in good faith notwithstanding such quit claim deed, if his grantor's title as shown by the registry record is apparently valid and clear, and he has no notice of any defect in the title.

GRAVES, J.: W. H. Rich, on April 17, 1906, commenced this action in the district court of Wichita county to quiet his title to the land in controversy against the claims of John S. Downs, who was asserting ownership thereto. The defendant in his answer denied the claim of the plaintiff, and alleged ownership and possession in himself, and prayed that his title be quieted as against the claims of the plaintiff. Plaintiff replied by a general denial. The case was tried to the court without a jury, and the court found in favor of Rich, and awarded him judgment for the land. Downs brings the case here for review.

The district court upon the trial found conclusions of fact and made them a part of the journal entry, as follows: "The court finds from the evidence that the three quarter sections of land belonged to Leggett and Butler, and on March 4, 1893, they conveyed it by warranty deed to B. M. Anderson, and that such deed was

filed for record in the office of the register of deeds for Wichita county on August 16, 1905; that Anderson conveyed the land by quit claim deed to John Downs, the defendant, on August 2, 1905, which deed was filed for record on August 16, 1905; that after the conveyance to Anderson, and on December 23, 1897, the widow and devisee of Butler, together with Leggett, conveyed the land by quit claim deed to E. A. Robinson, which deed was filed for record on April 27, 1898; that Robinson conveyed the land on March 2, 1898, to Benjamin Warren by warranty deed, which deed was filed for record on May 4, 1898, and Warren conveyed the land to W. H. Rich, the plaintiff, on October 12, 1905, by warranty deed, and that deed was filed for record on October 21, 1905; that, when Leggett and Mrs. Butler conveyed the land to Robinson, the deed was executed with the name of the grantee blank, and they were paid \$100 for the conveyance, but the evidence does not show who paid this money, except that it was not Robinson, and that he had nothing at all to do with the matter except to allow his name to be inserted in the deed from Leggett and Butler, and to make the warranty deed to Warren, all of which was done at the request of L. S. Dickey; that Warren, when he purchased the land, had no knowledge, so far as the evidence shows, of the prior unrecorded deed from Leggett and Butler to Anderson; that for several years the land was vacant and unoccupied, but at the time of beginning of this suit, and ever since August 16, 1905, it was in the possession of Wm. Reese as agent of Downs, the defendant."

As conclusions of law it found as follows: "And as conclusions of law the court finds that W. H. Rich, the plaintiff, by his warranty deed from Warren, acquired the same title to the land which Warren had, and that Warren by his warranty deed from Robinson acquired the complete title to the land free and clear from the defect of the title of the previous unrecorded warranty deed from Leggett and Butler to Anderson; that the defendant, John Downs, acquiring the title of Anderson after the deed to Warren had been recorded, is in the same position as Anderson would have been if he had been the defendant and had made no conveyance to Downs."

As supplemental to and explanatory of these conclusions, it appears from the testimony that some person whom the testimony fails to identify wrote to Leggett requesting a quit claim deed to the lands in controversy for the purpose of removing a cloud from the title. Leggett thinks this request came from one of the county officers of Wichita county. He thinks the county treasurer, or register of deeds, but

is not certain. Leggett, in reply to the request wrote that they had long before conveyed the land, and did not have any right or interest therein, but, if it was necessary to remove a cloud from the title, they would be glad to assist in any way. Subsequently they received quit claim deeds prepared and ready to be acknowledged. They were also requested to obtain certified copies of other papers relating to the title; and \$100 was sent to pay them for their trouble. The papers were duly obtained and sent by mail to the person making the request, but who it was Leggett could not state. The name of the grantee in the quit claim deed was left blank. The deeds subsequently appeared in the possession of L. S. Dickey, the register of deeds of Wichita county. How he obtained them does not appear. The only evidence upon the subject indicates that he had no communication with Leggett concerning the transaction. Dickey induced E. A. Robinson to permit his name to be written in the deeds as grantee, and also to execute a warranty deed to Benjamin Warren, Jr. Robinson had no interest in or knowledge of the transaction, and permitted the use of his name merely to accommodate Dickey. All the evidence upon the subject indicates that Dickey was not acting for Warren, and had not had any communication with him upon the subject. Who furnished the \$100 sent to Leggett, or who sent it, does not appear. Warren resided at Peoria, Ill., where he was engaged as a dealer in grain. The evidence does not show that he had any actual personal knowledge of the condition of the title when he accepted and paid for the deed. Nor is it shown by whom the deed was delivered to him nor to whom he paid the purchase price.

There is quite an extensive correspondence and some oral evidence shown that J. C. Donnell, who was county treasurer, transacted a large amount of business for Benjamin Warren, Jr., in buying real estate and paying taxes, but nothing to show that the land in controversy was the subject of any of this correspondence or was considered by either of them. From this the plaintiff in error infers that Donnell, acting for Warren, obtained the quit claim deed from Leggett and Butler, and caused Dickey to use Robinson as a "straw man" for the purpose of completing a good title to Warren. In that case Donnell must have known the entire transaction, and, being the agent of Warren, his knowledge would be imputed to Warren. This conclusion would require a very robust interpretation of the testimony, but, if the trial court had so found, this court might have hesitated before disturbing the finding, but, since the trial court found the contrary,

we are unable to say that there is no evidence to justify his conclusion.

It is argued with much force that Warren stands in the same attitude as though he were holding under a quit claim deed, and should be held to the same diligence in searching the records for outstanding conveyances, liens, encumbrance, and equities of all kinds that is required of one who takes a quit claim deed. The trouble, however, with this contention is that Warren did not take a quit claim deed, but received a deed of warranty for which he paid a valuable and adequate consideration. The law relating to quit claim deeds does not therefore apply to him. His rights are not affected by the fact that his grantor held under a quit claim deed only. *Meikle v. Borders*, 129 Ind. 529, 29 N. E. 29; *Winkler v. Miller*, 54 Iowa, 476, 6 N. W. 698; *Finch v. Trent*, 3 Tex. Civ. App. 568, 22 S. W. 132, 24 S. W. 679; *Sherwood v. Moelle* (C. C.), 36 Fed. 478, 1 L. R. A. 797; *United States v. Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; *Stanley v. Schawalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960; *Babcock v. Wells*, 25 R. I. 23, 54 Atl. 596, 105 Am. St. Rep. 848. This case has a note in which are collected a large number of cases upon various questions relating to quit claim deeds. At the time Warren received his warranty deed from Robinson, the record showed a quit claim deed from Leggett and Butler to Robinson, which was the only conveyance of any kind disclosed by the record in which they were grantors. At this time Warren does not appear to have had notice that there was any infirmity in his grantor's title. Under such circumstances, it seems that he acted with at least ordinary care and prudence in taking the warranty deed, and ought to be protected against an unrecorded conveyance. The deed of B. M. Anderson has been negligently withheld from record for twelve years. A man who ignores the requirements of the registry laws in this manner is not entitled to any great consideration if he suffers thereby. By negligently withholding a deed from record an invitation is given to those so disposed to mislead and defraud whoever may thereafter wish to deal with the land conveyed. Such a practice should not be encouraged.

Finally, it is urged that Downs placed his deed on record five days before the deed to Rich was recorded; but that fact seems to be immaterial. Downs held under a conveyance from Anderson, who had nothing to convey, his rights having been extinguished by the recorded conveyance to Warren; and, since Warren held a good title, he could convey it to

Rich, which he did. We think the conclusions of the trial court are justified under the facts.

The judgment of the district court is affirmed. All the Justices concurring.

Note. (1) *Quitclaim Grantees and (2) Quitclaim Deeds in Chains of Title.* (1). Inferentially it may be said that the principal case places itself on the side of those courts which hold, that a quitclaim grantee takes title just as it stood in the hands of his grantor, that is to say, subject to every sort of equity and notice existent against him, because the question here was to a prior unrecorded deed, and the only variance in authorities which hold that a quitclaim grantee is not protected is that some of the cases make exception in his favor as to an unrecorded deed.

This distinction is based upon registry acts. Thus in Missouri it was held that a quitclaim deed for a nominal consideration takes precedence over a prior unrecorded deed for a full consideration under a statute providing that no deed shall be valid except as between the parties and such as have actual notice thereof, until the same shall have been deposited with the recorder for record. *Strong v. Whybark*, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710. This state had held, generally, that a quitclaim grantee was not to be deemed a bona fide purchaser, but takes with notice of pre-existing equities. *Campbell v. Gas Light Co.*, 84 Mo. 352; *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609. But "a purchaser for value by quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by warranty deed." *Munson v. Ensor*, 84 Mo. 509, cited approvingly in the *Strong* case, *supra*. The later case of *Hendricks v. Calloway*, 211 Mo. 536, 111 S. W. 60, again reviews the distinction between equities not the subject of record under the Registry Act, and unrecorded deeds to which that Act applies. It says the doctrine that a quitclaim grantee may occupy the status of an innocent purchaser for value "has become a settled rule of property in this state. But all the foregoing (Missouri) cases recognize the following element in the rule under consideration, viz: That a quitclaim deed does not bar outstanding equities *not* the subject of record."

In *Williams v. Lumber & Shingle Co.*, 114 La. 448, 38 So. 414, where the contest was between grantee of a levee board and a quitclaim grantee, it was said: "The act under which alone the levee board could have acquired the land here in dispute provides for the registry of the title from the state to the board * * * and the general law upon the subject of registry applies to the conveyance of all lands alienated by the board." The finding was in favor of the quitclaim grantee, as the prior unregistered conveyance relied on by the plaintiff can be accorded of no effect against the vendee. This case will be referred to hereafter under our second head, as also the *Strong* case *supra*.

The mandatory terms of the Massachusetts recording act were upheld in favor of a quitclaim grantee without actual notice, the deed to him being in the chain of title, in *Stark v. Boynton*, 167 Mass. 443, 45 N. E. 764.

In *Schott v. Dosh*, 49 Neb. 187, 59 Am. St. Rep. 531, the opinion after reviewing Nebraska cases summarizes matters as follows: "The fore-

going review we think shows, that while the court has expressed itself to the effect that a quitclaim deed passes no more than the grantor's present interest, this expression has been used to state a general truth, and not as a construction of the recording act, and that so far as concerns the rights of a grantee under a quitclaim deed by virtue of the recording act, the court, while intimating that the tender of a quitclaim deed puts a purchaser on inquiry, has nevertheless always intimated that on proof of *bona fides* he is entitled to protection." There was a quitclaim in this chain.

In *Wilhelm v. Wilken*, 149 N. Y. 447, 32 L. R. A. 370, 52 Am. St. Rep. 743, the recording act is enforced with the like vigor as in the cases *supra*, and it was invoked to protect subsequent grantees of a quitclaim grantee.

Sanborn, C. J., speaking for a bench in Eighth Circuit Court of Appeals, composed of himself, Caldwell and Thayer, C. JJ., speaks of a long line of decisions by the U. S. Supreme Court holding that the registry statutes did not assist a quitclaim grantee in the particular way shown by the above cases, and then be somewhat complacently comments about "the riper experience and more thoughtful consideration of later years," exploding "the fallacy upon which the earlier decisions of the Supreme Court rested," and leading "that court to adopt the rule which has now become firmly established both upon reason and authority, that the innocent purchaser under a quitclaim deed may acquire the title under the registry statutes as against a prior unrecorded deed from the same grantor notwithstanding the fact that the latter had no title." *Boynton v. Haggard*; 120 Fed. 819. Among some C. C. A. cases he cites the *Moelle* case, cited by the principal case, as reported in 148 U. S. 21, and *U. S. v. Calif. Land Co.*, also there cited.

But there are many cases which hold as was said in the *Schott* and *Wilhelm* cases that independently of registry acts the question is merely one of *bona fides*. Thus see *Graff v. Middleton*, 43 Cal. 341; *Bradbury v. Davis*, 5 Colo. 265 and the cases cited, but hardly applicable, in a question of subsequent grantees of a quitclaim grantee, by the principal case, for the reason that they hold such deed good to the grantee himself.

(2). What we wish to inquire into now is, whether or not where the deed to him affects him with notice, such notice is carried along to subsequent grantees or sub-purchasers. The *Strong* and *Williams* cases *supra* do not decide, but there is an inference that had the quitclaim deeds in the chains of title have been subject to pre-existing equities not the subject of registry acts the sub-purchasers would not have been protected. Were the reverse the fact, these cases need not have referred to the distinction we traced as to unrecorded deeds. And the same observation may be advanced as to the *Stark* case *supra*, especially as the court remarks in its opinion that: "It is not contended that the plaintiff *Stark* (a sub-purchaser of the quitclaim grantee), had actual notice or knowledge of the defendant's prior unrecorded deed."

The *Schott* case *supra*, also in one part of the opinion carries the same inference as above, but this is weakened by the court further saying: "The following cases hold, and we think with better reason, that there is no distinction in the

form of conveyance * * * and that under them (irrespective of the recording acts) the question is not under what form of conveyance one claims, but whether one is a *bona fide* purchaser, and that, therefore, the holder of a quitclaim deed is entitled to the same protection as one under a deed of bargain and sale or containing covenants of warranty." That view would certainly protect a sub-purchaser without notice.

The New York case of *Wilhelm v. Wilken*, *supra*, seems quite pointedly subject to the inference we speak of, if this inference is not withdrawn by the following remark: "The practice of transferring title to real estate through quitclaim deeds has not been uncommon in this (New York) state, and in the absence of any facts creating a suspicion as to the transaction of transfer, there is nothing especially significant in the use of such a mode of conveyance." But this would seem to make the doing of a thing not "uncommon" overcome an old rule of law regarding equities not affected by recording acts. This does not appear to be a very satisfactory treatment of a principle. The *Meikel* case does not announce the principle stated in the principal case, but the recording act intervened there and what was said did not reach the question we have in mind except by way of a general statement.

In *Winkler v. Miller*, 54 Iowa, 476, there was a prior unrecorded deed, but the case was decided without stress being laid on the registry acts as one of general equity and the quitclaim grantee's title being had in him, and it was held he could convey a good title to a subsequent grantee by warranty deed. The court said: "It is not unreasonable to conclude that a quitclaim deed occurs in the line of many titles where there is no outstanding equity. If the rule contended for by plaintiff should be held, it would tend directly to impair the selling value of all such property." The opinion cites no authority and is otherwise quite unsatisfactory.

In *Mason v. Black*, 87 Mo. 329, a quitclaim deed in a chain of title recited that: "It is intended to convey by these presents, all title of which I am vested this day, and not to invalidate any sale heretofore made, if any," put a subsequent purchaser on inquiry, and prevented the acquisition of title against an outstanding equity. This decision, however, turns on its facts and the inference from the court's reasoning is that a mere quitclaim in ordinary form would have enabled the grantee to convey a good title, under warranty deed, to a subsequent purchaser.

In *Carter v. Wise*, 39 Tex. 273, the court refers to *Hamman v. Keigwin*, ib. 34, as establishing the doctrine that a quitclaim grantee cannot be an innocent purchaser and deduces from that neither can those who hold under or through him be innocent purchasers. The *Hamman* case rests, for authority, on older cases of U. S. Supreme Court, which Judge *Sanborn* says "the riper experience" of that court has discarded. But it may be said, that a state court might experience more difficulty in discarding a doctrine than a federal court, because the former, and not the latter, creates rules of property. In *Milam County v. Bateman*, 54 Tex. 153, the *Hamman* and *Carter* cases are approved. In *Wallace v. Crow* (Tex.), 1 S. W. 372, the general doctrine in the above cases was approved in the following words: "The second purchaser, if without notice, takes

title as against the unrecorded deed, not because any title remained in the vendor after the first conveyance, but simply by force of the registration laws. These laws have, however, no healing virtue that can cure the defects of a quitclaim deed." But in *Garrett v. Christopher*, 74 Tex. 453, the rule as to quitclaim deed, whether as relates to an immediate or remote grantee preventing one from being an innocent purchaser is still recognized, a distinction is drawn thus: "If the deed purports and is intended to convey only the right, title and interest in the land, as distinguished from the land itself, it comes within the strict sense of a quitclaim deed and will not sustain the defense of innocent purchaser." * * * The use of the word "quitclaim" does not restrict the conveyance if other language employed in the instrument indicates the intention to convey the land itself." The *habendum* clause indicates that the deed is not strictly a quitclaim. As to such a deed in a chain of title an under purchaser is held protected. See also *Finch v. Trent*, 3 Tex. Civ. App. 568, 24 S. W. 132, following *Garrett v. Christopher, supra*.

A deed having no *habendum* clause has been ruled not to be protected by the registration acts. *Fowler v. Will*, 19 S. D. 131, 117 Am. St. Rep. 938. Further on this subject see *Parker v. Randolph*, 5 S. D. 548, 29 L. R. A. 33.

CONCLUSION. It would seem that the tendency of decision is to give quitclaim deeds larger effect than formerly was recognized and courts endeavor to get away from older ruling by distinguishing between deeds which simply convey an interest in, instead of, land itself, only the former being strictly quitclaim. But at all events the great weight of authority is in favor of protecting grantees against unrecorded conveyances. We do not find any very discriminating authority placing a subsequent grantee in a better position than his grantor who took by quitclaim deed. The cases cited by the principal case are those which also protect the quitclaim grantee.

C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Criminal Law—Taxicab Driver Falsifying Account by Manipulating Register.—The falsification of a taximeter machine on a taxi-cab is the falsification of an "account" within the meaning of s. 1 of the Falsification of Accounts Act, 1875. The driver of a taxi-cab owned by a company who is subject to various regulations issued by the company on pain of "dismissal" who wears the uniform of the company but who takes out his cab each day to ply for hire in the streets of London, paying to the company 75 per cent of his daily receipts, may be a "servant" of the company within the meaning of s. 1, of the Falsification of Accounts Act, 1875, and receive the money of his fares for and on behalf of the company within the meaning of the Larceny Act, 1901.—*Rex v. Solomons* (Ct. Cr. App., July, 1909).

From the evidence for the prosecution it appeared that on March 31st, April 1st, 2d and 3d, the appellant, when plying for hire a taxi-cab

owned by the General Motor Cab Company, drove two music-hall artistes from the Holborn Music Hall to the Crouch End Hippodrome and back with his flag up or only tilted, so that the taximeter was not in operation, as it should have been while he was carrying fares. The appellant charged his passengers 9s. each day, which was less than the proper fare had it been registered by the taximeter.

Alverstone, Ld. Ch. J.: "It has been contended that as the appellant took out this taxi-cab paying nothing for its hire but receiving as remuneration 75 per cent of what he took from his fares, he was not a 'servant' within the meaning of this section. With that contention we cannot agree. He was certainly not in the position of the hirer of a chattel who can take the chattel away and use it how or where he likes and make no return to the owner of the profits which he obtains from the use of the chattel. There have been many cases in which persons have been recognized as not being servants; but the law has been clear ever since the decision in *Rex v. Hartley* (1807), Russ & R. 139. We must look at the whole substance of the facts proved. In this case we have no doubt that the appellant was in the position of a servant. That being so it is clear that this conviction must stand; for it was not seriously contended that the taximeter sheet and slip were not accounts or an account, and that they had not been falsified. The sheet was filled up from the slip and the slip from the record of the taximeter, and the appellant signed a declaration certifying that the figures were correct. The appellant, therefore, made or concurred in making a false entry in an account within the meaning of this section. We also hold that an offense was committed within the meaning of this section when the taximeter itself was falsified. There are now in use many mechanical contrivances for counting money received, and it would be a serious thing if this court were to hold that the falsification of a mechanical means of recording an account was not the falsification of an 'account' within the meaning of this section."

Deeds—Indefinite Covenant Reserving Right to Construct a Tunnel Not Obnoxious to Rule Against Perpetuities.—On a purchase of land in 1847 a railway company agreed with the vendor that the vendor, his heirs, appointees, and assigns, should have the right at any time to make a tunnel beneath the land sold. Held by court of appeal that this was a personal contract, which was not obnoxious to the rule against perpetuities and could be enforced against the railway company by the assigns of the original vendor.—*Southeastern Railway Co. v. Portland Cement Manufacturers*, 54 Sol. J. 80.

Mortgage—Foreclosure by First Mortgagee—Right of Second Mortgagee to Sue on Covenant.—A second mortgagee who submits to a foreclosure order absolute in an action for first mortgage does not thereby disentitle himself to sue on his covenant for payment and to recover judgment for the mortgage debt.—*Worthington & Co. v. Abbott* (Ch. D., Nov., 1909).

Eve, J.: "It has been strenuously argued that a puisne incumbrancer who voluntarily submits to an order absolute precludes himself from suing on the covenant, and in support of that contention a number of cases have been cited which certainly determine this; that if the mortgagee does something which he is unauthorized to do, by express terms of the contract or by implication, to the detriment of the mortgagor,

he cannot sue on the covenant if he is not in a position to restore the property after the debt is discharged. Does an act of this sort fall within the principle established by those cases? The position of the pulsne incumbrancer when the summons was served upon him was this: That he might take one of three courses—he might enter no appearance; he might appear and insist on his rights; or, thirdly, he might, as was done here, say, 'I am satisfied that the security is insufficient and as to the bona fides of the accounts, and I waive my right to insist upon the accounts being taken and to have the opportunity of doing that which I never intend to do—namely, to redeem.' Now, I have not heard it contended that if he had adopted either of the first two courses he would have prejudiced himself with regard to the covenant. In either case he would still have retained his right to sue. If he adopted the second course, what would have been the result? In the end, his only right would have been to add the costs he had incurred to his security. If he elects not to incur the expense or not to impose on the plaintiff the expense of taking accounts, and elects to say at once that which he knows perfectly well he is going to say at the end of six months—namely, 'I do not intend to redeem'—that cannot put him in a worse position as regards the mortgagor, and I cannot see upon what principle it ought to do so. It was open to the mortgagor to insist on accounts being taken, and on having proper time to redeem. The only effect of the mortgagee's conduct was that they dropped one link in the process of redemption, and I cannot see how that was to the detriment of the mortgagor."

Powers—Release Inter Vivos of Testamentary Power of Appointment.—The donee of a testamentary power of appointment over settled funds among her children and issue agreed with two of her sons that she would not exercise the power so as to reduce the share of either to less than £7,000, and that the sum should vest in possession upon her decease, and with one of these sons that his share should be at least £7,000, and she agreed with a third son that she would so far release her power and so far contract not to exercise it that his share should be at least £7,000. By her will she appointed and settled the trust funds so that none of the three sons would be entitled in possession to his share. Held, (applying the principle in *Davis v Huguenin*, 1 H. & M. 730, but for the reason only that the principle had been adopted by long-settled practice), that the three sons were entitled in possession to £7,000 each, less advances respectively made to them out of and in respect of such sums.—*Molineux v. Evered* (Ch. D., Nov., 1909).

Neville, J.: "How far the donee of a testamentary power of appointment among a class can by a non-testamentary instrument affect the distribution of a fund has been the subject of decisions not easy to follow. It has been decided that such a power may be released. That a covenant to appoint a share to one of the class cannot be specifically performed does not affect the fund. An appointment, however, is not bad because it is in pursuance of such a covenant. It has been said that such a covenant is altogether void. In *re Parkin* (1892), 3 Ch. 510, it was held that damages can be recovered for breach of such a covenant. In *re Bradshaw* (1902), 1 Ch. 426, it was held that they cannot. Inasmuch as the power over the whole fund can be released, I think it can

also be released over part of the fund. If it can be released by express words I think it may be released by implication. Where, however, the covenant is that the share of the covenantee shall not be less than a fixed sum, the obligation may be satisfied either by appointing the same by will or by leaving unappointed sufficient to provide, on division, for the sum mentioned. In such a case I fail to see how any implication of release can arise. To hold that in a covenant which can be fulfilled by release of the power or otherwise there can be an implication of release appears to me inconsistent with the very nature of a legal implication, which is confined to cases of necessity. If I were free to follow my own opinion I should be inclined to hold that a covenant not to exercise testamentary power so as to reduce the covenantee's share below a fixed sum would not affect the fund at all, any remedy the covenantee might have for breach of the covenant being against the estate of the covenanter. In *Davies v. Huguenin*, 1 H. & M. 730, it was held that there was a release *pro tanto* of a power in the following circumstances. One John Davies had under his marriage settlement testamentary power of appointment over settled estates, and it was provided that if he did not exercise his power of appointment the trustees, in whom a term of 500 years was vested for that purpose, were to raise the sum of £6,000, to be divided equally among his younger children. Upon the marriage of one daughter he covenanted that he would not appoint or do any act to diminish the share to which she might become entitled in the pecuniary division or portion secured to the younger children under the settlement. Such share in the event proved to be £1,500. He did appoint £1,000 to this daughter. It was held that the covenant amounted to a release of the power *pro tanto*, and the sum of £500 was directed to be raised out of the estate to Harriet, in addition to the £1,000. Now what is meant here by '*pro tanto*'? John Davies had no power to appoint the £6,000 among his children, but if he did not execute his testamentary power over the estates the daughter took an aliquot share in the £6,000. The only release which could have secured the share in the £6,000 was of the whole power, for if John Davies exercised the power in any way the £6,000 was not to be raised. This so-called release *pro tanto*, it appears to me, was not in the true sense a release, but a fetter on the power, so that, if exercised at all, it must include an appointment of £1,500 to the daughter. Had there been a release of the whole power, not only would the £6,000 have had to be raised, but the daughter would have been a tenant in common in tail of the estates, subject to the term for five hundred years. In fact, the judgment affects no interests arising from the exercise of the power except to the extent necessary to provide the £1,500 secured to the daughter under the covenant. The decision is a peculiar one, but upon an attentive perusal of the case it is plain, and if is not the first time the courts have gone far in order to facilitate the disposal of property. The facts in *Davies v. Huguenin* are a little complicated, and it might have been suggested that the true extent of the decision has escaped notice, but such a suggestion is precluded by the lucid judgment of Kindersley, V. C., in *Coffin v. Cooper*, 1865, 2 Dr. & Sm. 365, where he says: 'But not only has it been decided that an appointment made in pursuance of such a covenant—that is a covenant that the share shall not be less than the stated amount—is valid,

but it has been held that such a covenant so entirely precludes any testamentary appointment inconsistent with it that the covenantee may compel the other appointees to make it good out of the shares which the donee of the power has appointed to them by will': Davies v. Huguenin, 1 H. & M. 730. I do not presume to say that that is a wrong decision, indeed it seems to me that it is the legitimate result of the first innovation. But its effect is literally this, that the donee of a power to appoint among children by will only can by deed fix the shares which the children shall take; in other words, he may convert a power to appoint by will only into a power to appoint by deed. Davies v. Huguenin was decided in 1862, and at that date Page-Wood, V. C., thought the point almost unarguable. The case has been cited as an authority in the text books, and innumerable transactions must have taken place on the face of it, including, as I think, those in the case before me."

Principal and Agent—Custom of Stock Exchange as to Secret Profit.—The word "net" in a continuation note is not a sufficient disclosure to a principal not acquainted with the Stock Exchange custom, of the fact that the sum so qualified includes a charge by the broker for his services in respect of the carry-over.—*Stubbs v. Slater & Bond.*

Neville, J., in his judgment said: I do not think that there was any special agreement concerning the broker's remuneration; in my opinion the evidence does not amount to such a bargain. With regard to the entry "8½d. net," it is clear that it represents continuation money—that is, it purports to have been paid to the jobber for his services in effecting the carrying-over. The jobber in most cases charges a percentage, but sometimes so many pence per share. According to the custom on the Stock Exchange, a given number of pence followed by the word net includes a sum paid to the broker for his services in the carrying over. When this is understood it cannot, of course, be objected to. Some members of the public who are not on the Stock Exchange no doubt are aware of the custom, but a large number are not. I am satisfied that the plaintiff did not know that the entry included a broker's charge. It is, on the face of it, a representation of a sum paid to the jobber, whereas, in fact, an arbitrary amount is added to the continuation money proper, and "net" is added to show that this has been done. To one not acquainted with the custom net conveys nothing of the kind. The charge is, therefore, not one which can be properly made by a broker against his client. It is said that in any event the plaintiff was put upon inquiry, but that his principal was put on inquiry is no defense to an agent; *Dunne v. English*, L. R. 18 Eq. 524. The rule of the court is rigid that an agent is not entitled to make a secret charge any more than he is entitled to make a secret profit. In this account the broker's charge is concealed in the lump sum. In my opinion, the rule is without regard to whether the concealed charge is reasonable or not. It is said that the actual charge was less than that which might reasonably have been made. That is immaterial. I think that the rule laid down in *Solomons v. Pender*, 3 H. & C. 639, applies, and that the exception to that rule illustrated by the case of *Hippisley v. Kneel Brothers* (1905), 1 K. B. 1, does not, because the concealed remuneration in the present case is in respect of the precise matter in which the

agent was instructed to act, and not in respect of some collateral transaction. In this case the accounts were not rendered in this form with any dishonest purpose, but that is immaterial. The system is a dishonest system.

Railroads—Whether "Sandstone" is a "Mineral" in an Act Exempting Minerals in Conveyance to Railroads.—A statute in England excepted "minerals" from grants to railroads. Held that this exception, from the very nature of the grant, could not include such general substances as sandstone, which constitute such a material part of the crust of the earth.—*North British Railway Co. v. Budhill Coal and Sandstone Co.*, 54 Sol. J. 79.

Such a construction, Lord Loreburn said, would be virtually to nullify all grants to railroads underlaid with any valuable stone. "In many parts of England and Scotland," said Lord Loreburn, "sandstone formed, as here, the substratum of the soil, with, no doubt, other kinds of rock intermixed. If it be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether unless the company chose on notice to buy the ordinary rock lying beneath it."

ENGLISH NOTES.

In the Court of Session, Edinburgh, on Saturday, says the London Times, the First Division ordered the expulsion of Frank Montgomery Henderson Young, Thomas Mitchell, and Robert Scott Chalmers from the Society of Solicitors in the Supreme Courts of Scotland, and the removal of their names from the roll of law agents. It was proved that Young had acted as law agent and factor in Scotland on the trust estate of the late Mr. Forbes, of Dunottar, managed by English solicitors, and had embezzled from the trusts £16,000, which had been used in speculation. Mitchell had embezzled nearly the whole of the trust estate of the late Mr. John Lang, Largs, which amounted to £29,900, and Chalmers, during the period he was acting as secretary of the Scottish Oil and Guano Company, sold shares in his own person which were registered in the name of somebody else. His defalcations amounted to over £1,000.

On Wednesday, in the House of Lords, on an application by counsel for the respondents in an appeal to postpone the hearing on the ground that his brief was not delivered till about 6 o'clock the previous evening, the Lord Chancellor said, according to the London Times: "Here we are with a very heavy list of appeals, and we have other duties to discharge. We cannot allow the business of the House to be trifled with. If solicitors do not instruct counsel in proper time for the counsel to be ready to argue a case which in any event is only two or three out of the list, they must take the consequences, and be answerable to their clients in the matter. It is quite impos-

sible to allow the solicitor in a case to run things so fine as to leave the House without proper business to do. Their lordships proceeded with the hearing of the next case on the list, without releasing the parties in the first case.

Nearly one hundred and fifty lawyers, including, of course, a good many nominal members of the bar, sat, says a writer in the London Globe, in the late Parliament. To judge from the lengthening list of legal candidates, the number of barristers and solicitors in the next Parliament will certainly not be smaller. Though it is evident that the constituencies have no objection to being represented by lawyers, some ill-conditioned persons are already complaining that members of the legal profession are too numerous in the Parliamentary arena. This prejudice against political lawyers is no new thing. An ordinance passed in 1372 provided that "no man of the law, pursuing business in the King's courts . . . shall be returned or accepted knight of the shire," and that—this was, perhaps, the unkindest cut of all—"no such man of law . . . then returned to Parliament shall have wages." Everybody knows that it was the unhappy fate of the Parliament from which lawyers were excluded to become known as the "lack-learning Parliament."

A letter which recently appeared in the London Times contained the statement that within the last few months several millions had been remitted from Great Britain for the purchase of Japanese securities, and that the bonds received in exchange for the money would remain in safe custody in Japan. This letter has been followed by another in one of the financial periodicals in which it is affirmed that the real reason why these bonds are being sent by their owners to Japan is to enable the latter to evade the tax collectors in England by making a false declaration of their real income, and that they contend that if the coupons are re-invested in Japan as they fall due, instead of being remitted to England, they cannot be regarded as income subject to taxation. The writer goes on to suggest that an Act should be passed making it a criminal offense for any person resident in Great Britain to wilfully omit to disclose the income which he derives from securities deposited abroad. "It is unnecessary," says the Solicitor's Journal (London), "to say that we have not the slightest sympathy with those who fraudulently conceal the amount of the income which they receive in this country, and thereby increase the burden upon those who are more scrupulous in their dealings with the Government. But our judges have always recognized the legal and the moral right of every man to dispose of his property, if he can, in a way which does not expose it to be taxed under the existing system of taxation. The question, as it appears to us, is whether the income from these Japanese investments is ultimately received by the investor in the United Kingdom? So long as the money representing this income remains abroad, we have great difficulty in seeing that there has been a receipt by the investor within the meaning of the Income Tax Acts."

HUMOR OF THE LAW.

In a recent divorce case in Adams County, Ohio, the wife charged the husband with many and divers acts of extreme cruelty.

The husband filed a cross-petition charging the wife with a systematic course of abuse and among others the following allegations appear:

"That she persistently accused defendant of committing adultery and fornication with various women and of being the father of numerous bastard children, and circulated this report generally amongst the neighbors; that to have been guilty as charged by plaintiff, he would have had to devote his entire time to licentiousness."

"Plaintiff called defendant a liar so often that an attempt to remember all the instances produces dizziness."

"That at divers times when he was working on his own farm and on adjoining farms, plaintiff would play the sleuth, and shadow defendant's movements, dodging from tree to tree and sneaking through unfrequented places much after the order of Sherlock Holmes."

That was a pretty good way of squelching a legal opinion, as illustrated in the case of Gifford Pinchot, the United States Forester, at the recent Seventeenth National Irrigation Congress at Spokane.

Ex-Judge Campbell of the Department of Justice, sitting beside Mr. Pinchot at a press banquet, made a long harangue upon the illegality of the Forestry Service, and then a personal attack upon Pinchot. When he was through, Mr. Pinchot, smiling as usual, told a single story which effectively closed the episode. It reminded him, he said—the wanderings of the legal mind reminded him—of the story of the Irishman who fell from a high building on which he was working. As he lay on his back with his eyes shut, his palms open upward, the doctor came and looked at him.

"No good to do anything. He's dead," said the doctor.

Just then Pat rose up from his swoon and started up the ladder again. The foreman caught him by the arm.

"Here, here, Pat," said the foreman. "Lie down again, now, that's a good fellow. The doctor knows best, Pat."

All lawyers know the "confidential witness" who, ignoring the jury, insists upon telling the judge his testimony. One of this class had never been inside of a courthouse until he was put on the witness stand.

As soon as the questioning began, he turned his back to the jury, and told his story to the judge, in a confidential sort of way, as though they were chums.

"Address yourself to the jury, said the judge, blandly.

The man paused, but not understanding his honor's direction, went on with his testimony.

"Speak to the jury, sir," again directed the judge; "the men sitting behind you on the raised benches."

Turning around, the witness, bowing awkwardly, said, "Good morning, gentlemen!"—Ohio Law Bulletin.

WEEKLY DIGEST.

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1. Accident Insurance—Waiver.—In an action on an accident policy, a tender of a part of the policy, in accordance with one of the defenses in the case, held not a waiver of the right to insist on another defense going to the validity of the policy.—Kelly v. United States Health & Accident Ins. Co., S. C., 65 S. E. 949.

2. Accord and Satisfaction—“Paid in Full.”—The cashing by a creditor of a check containing the words “paid in full,” sent by the debtor, is not an accord and satisfaction, unless there is a genuine dispute between the parties as to the amount due.—Caravia v. Levy, 119 N. Y. Supp. 160.

3. Adverse Possession—Intent.—An essential element of adverse possession is the intention to claim title, and, where there is no such intention, there can be no pretense of an adverse possession.—Lathrop v. Levern, Vt., 74 Atl. 381.

4. Animals—Dangerous Animal.—It is not ordinarily negligence to permit a youth 15 years old to lead a horse, unless the horse has vicious or dangerous tendencies, of which the person charged with the negligence should have been aware.—Raible v. Hygienic Ice & Refrigerating Co., 119 N. Y. Supp. 188.

5.—Recording Brands.—A brand and ear-

mark recorded, as provided by B. & C. Comp. §§ 4201, 4204, are *prima facie* evidence of the ownership of the animal on which found.—State v. Brinkley, Ore., 104 Pac. 893.

6.—Stock Law Election.—Under Sayles' Ann. Civ. St. 1897, art. 4980, a stock-law election held invalid because the subdivision in which the election was to be held was not described by metes and bounds.—Ex parte Gullidge, Tex., 122 S. W. 21.

7. Appeal and Error—Abstract of Record.—Where appellees do not enter an appearance or question the sufficiency of appellants' abstract, it will be acted on as a statement of all the facts in the record.—Atwood v. Interstate Amusement Co., Iowa, 123 N. W. 63.

8.—Intervention.—Where, after a case has been taken to the supreme court on a writ of error, an intervention is permitted, the intervenor may be allowed to withdraw his petition on application of his counsel at the oral argument.—Uzzell v. Lunney, Colo., 104 Pac. 945.

9. Arrest—Privilege on Extradition.—A person, arrested in another state and returned to Michigan upon requisition for a criminal charge, held privileged from arrest in a civil suit.—Weale v. Clinton Circuit Judge, Mich., 123 N. W. 31.

10. Assault and Battery—Resisting a Trespass.—Mere trespass upon land, even after the trespasser has been warned to depart and has refused, held not to justify the owner in the use of a deadly weapon.—Dickinson v. State, Okla., 104 Pac. 923.

11. Attachment—Interpleader by Seller.—The seller, after giving notice of the exercise of his right of stoppage in transitu, may interplead in attachment proceedings by a creditor of the buyer.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

12.—Right to Seize Goods in Transitu.—Where, in claim of third person to property attached, the court finds that claimant had acquired title by bill of sale from the consignee, such finding does not sustain judgment on the ground of the right of claimant, as vendor, to seize the goods while in transit.—Kelley-Steinmetz Liquor Co. v. Haugen, Minn., 123 N. W. 61.

13. Bankruptcy—Burden to Show Release of Debt.—Burden is on judgment creditors, filing claims against decedent's estate, to show they were not released by his discharge in bankruptcy.—In re Peterson's Estate, 118 N. Y. Supp. 1077.

14.—Trustee.—A trustee in bankruptcy has a legal status to attack a judgment illegally entered against the bankrupt.—Garrison v. Seckendorff, N. J., 74 Atl. 311.

15. Bills and Notes—Bona Fides.—That the holder of a note which was in fact given for insurance premiums for a less sum than the full premium, in violation of statute, knew that his transferee was an insurance agent and that the note was given in whole or in part for premiums, did not make him a holder in bad faith.—Gray v. Boyle, Wash., 104 Pac. 828.

16.—Consideration.—In an action on notes, want of consideration when pleaded may be shown, though due execution and genuineness of the notes sued on be not denied.—Bradley v. Bush, Cal., 104 Pac. 845.

17. Boundaries—Limitations.—Where the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-

defined limits of the whole lot.—*Washam v. Harrison*, Tex., 122 S. W. 52.

18. **Brokers—Commissions.**—A broker, employed to sell property, earns his commissions when he brings to his principal a customer ready, willing, and able to buy, and it is not necessary for him to take part in making the contract of sale.—*Willard v. Wright*, Mass., 89 N. E. 559.

19. **Building and Loan Associations—Estoppel.**—One who was present and had the means of knowing that stock was improperly voted, but who failed to object, cannot thereafter raise the question.—*In re United Towns Building & Loan Ass'n*, N. J., 74 Atl. 310.

20. **Carriers of Goods—Freight in Custodia Legis.**—Gen. St. Kan. 1901, §§ 5278, 5282, place the defendant's property in custodia legis from the time of service of notice of attachment upon the garnishee, so that a railroad company ceased to hold defendant's property as a carrier after service of notice upon it in garnishment proceedings.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.*, Mo., 122 S. W. 10.

21.—Notice of Claim.—A shipper in a shipping contract held only required to give notice of his claim for damages to the connecting carrier, to make it liable therefor.—*Needham v. Boston & M. R. Co.*, Vt., 74 Atl. 226.

22.—Stoppage in Transitu.—The exercise of the right of stoppage in transitu by the seller vests in each party to the sale the rights he had before the goods were delivered to the carrier.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.*, Mo., 122 S. W. 10.

23. **Carriers of Live Stock—Rest Yards.**—A carrier furnishing a rest yard for stock away from its tracks must transfer the stock and assume liability for loss in doing so.—*Drake v. Great Northern Ry. Co.*, S. D., 123 N. W. 82.

24. **Carriers of Passengers—Alighting Passenger.**—Failure of a railroad allowing passengers to board and alight from trains at a coal chute to maintain a railing across the mouth of the chute held negligence.—*Credle v. Norfolk & S. R. Co.*, N. C., 65 S. E. 604.

25.—Proximate Cause.—Failure to stop a street car at the corner requested held not the proximate cause of injury, where a passenger voluntarily alighted at the next corner, and then walked "a good piece" and slipped and fell.—*Robertson v. West Jersey & S. R. Co.*, N. J., 74 Atl. 300.

26.—Stations.—A railroad held guilty of negligence in not providing sufficient light at the depot platform to enable its passengers to alight in safety.—*Skow v. Green Bay & W. Ry. Co.*, Wis., 123 N. W. 128.

27.—When Relation Begins.—The relation of carrier and passenger begins as soon as one, intending in good faith to become a passenger, enters the carrier's premises for that purpose, and the carrier's responsibility dates from that time.—*Riley v. Vallejo Ferry Co.*, U. S. D. C., N. D. Cal., 173 Fed. 331.

28. **Champery and Maintenance—Conveyance by Person in Possession.**—A grantor, without right of entry, having secured possession by lawful means, her conveyance was not void for champery.—*Halsted v. Silberstein*, N. Y., 89 N. E. 448.

29. **Conspiracy—Insanity Proceedings.**—If defendants learned facts justifying them as reasonably prudent men in instituting proceedings

to inquire into plaintiff's sanity, they acted upon probable cause, and were not liable for conspiring to commit him to an insane asylum.—*Scheunert v. Albers*, Wis., 123 N. W. 155.

30. **Constitutional Law—Delegating Legislative Power.**—Acts 1895, p. 70, c. 54, amending School Law (Acts 1873, p. 41, c. 25) § 8, relating to the qualifications of county superintendent of public schools, held not unconstitutional, as delegating legislative power to the board of education.—*State v. Evans*, Tenn., 122 S. W. 81.

31.—Depriving Defendant of a Lawful Defense.—Act Mo. Feb. 28, 1907 (Laws 1907, p. 181) § 1, requiring railroads to block frogs, switches, etc., and depriving them of the defense of contributory negligence in actions for injuries resulting from noncompliance with the act, held not to deprive the railroad company of its property without due process of law.—*St. Louis, I. M. & S. R. Co. v. McNamare*, Ark., 122 S. W. 102.

32.—Impleading a Party on Day of Trial.—A judgment against one made a party in open court at the trial by amendment over objection is a violation of the guaranty of due process of law.—*Hubbard v. Montross Metal Shingle Co.*, N. J., 74 Atl. 254.

33.—Railroad Tax Exemption.—The railroad tax exemption granted by Const. 1898, art. 230, held not to violate any of the restrictions of the enabling act of 1896 (Laws 1896, p. 85, No. 52), and that act has no application to the constitutional amendment of 1904, granting a like exemption.—*Louisiana Ry. & Navigation Co. v. Madere*, La., 50 So. 609.

34.—Right of Petition.—The right under Const. § 1, subsec. 6, to petition the legislature for a proper purpose includes the right to lawfully circulate a petition and procure others to sign it.—*Yancey v. Commonwealth*, Ky., 122 S. W. 123.

35.—Subjecting Exempt Property to Executor.—A statute authorizing execution on a judgment previously rendered, and subjecting thereto property exempt at the time of the rendition of the judgment, held not to impair any contract.—*Laird v. Carton*, N. Y., 89 N. E. 822.

36. **Contempt—Act Constituting.**—It is contempt at common law to scandalize a court of record by a newspaper publication in respect to its decision in a case no longer pending.—*State v. Hildreth*, Vt., 74 Atl. 71.

37. **Contracts—Collateral or Independent Contracts.**—In deciding whether a particular promise or agreement is collateral and independent of a principal and written contract, it must be determined whether the parties to the written contract intended to include therein all of the promises relating to the subject-matter under consideration.—*Lese v. Lamprecht*, N. Y., 89 N. E. 365.

38.—Restraint of Trade.—A covenant not to engage in a particular business, upon its sale, is valid, even if limited as to time and place, if it is necessary to protect the purchaser.—*Marshall Engine Co. v. New Marshall Engine Co.*, Mass., 89 N. E. 548.

39.—Right to Terminate.—No date being fixed for the determination of a certain contract, held that it might be terminated at the pleasure of either party.—*Rosenblatt v. Weinman*, Pa., 74 Atl. 54.

40. **Corporations—Authority of General Manager.**—The general manager of a corporation held

authorized to bind the corporation to pay plaintiff for extra work in the construction of a sewer system for its building.—Mahoney v. Hartford Inv. Corp., Conn., 73 Atl. 766.

41.—Authority to Bind.—One not an officer of a corporation, though the principal stockholder thereof, has no authority to bind it by contract.—Collins v. Leary, N. J., 74 Atl. 42.

42.—Corporate Seal.—The presence of a seal upon an instrument is only *prima facie* proof that it was attached by a proper authority.—Gause v. Commonwealth Trust Co. of New York, N. Y., 89 N. E. 476.

43.—Power to Assume Another Debt.—A trading corporation held not to have the power of assuming a debt of another corporation.—Morris v. Ernest Wiener Co., 119 N. Y. Supp. 163.

44.—Residence of President.—The law does not require the president of a private corporation to reside in the parish of its domicile, nor does it forbid him administering its affairs through agents or clerks.—Semple v. Frisco Land Co., La., 50 So. 619.

45.—Right to Sue on Bond.—Corporate bonds held negotiable instruments giving the holder a right to sue, and a pledgee is not required to sell them and apply the proceeds to the debt, but may sue thereon.—Stegmaler v. Keystone Coal Co., Pa., 74 Atl. 58.

46.—Purchase of Own Stock.—A transfer by a corporation of corporate assets to a stockholder for his stock, thereby rendering it insolvent, held void as to subsequent creditors.—Atlanta & Walworth Butter & Cheese Ass'n v. Smith, Wis., 123 N. W. 106.

47. Courts—Jurisdiction.—Under Acts 1907, p. 233, c. 82, § 7, the supreme court held not to have jurisdiction of a suit to establish certain rights in a homestead, as a homestead cannot exceed \$1,000 in value.—Bell v. Noe, Tenn., 122 S. W. 81.

48.—Must Speak Through Records.—The fiscal court, like other courts, must speak through its records, and extraneous evidence is not admissible to show the meaning of its orders.—Milliken v. George L. Gillum & Son, Ky., 122 S. W. 151.

49.—Stare Decisis.—Where a supreme court is composed of seven judges because of the disqualification of one, a decision by a majority of the seven is effective as stare decisis.—Dolph v. Norton, Mich., 123 N. W. 13.

50. Covenants—Breach.—A covenant of warranty is not considered a debt until broken.—McKillop v. Post, Vt., 74 Atl. 78.

51. Criminal Evidence—Dying Declarations.—It is not necessary that the preliminary foundation for a dying declaration should be proved by express utterances of decedent, but it may be gathered from all the circumstances.—Copeland v. State, Fla., 50 So. 621.

52.—Experts.—One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question.—Copeland v. State, Fla., 50 So. 621.

53.—Showing Ill Will.—In a prosecution for homicide, defendant's mistress held properly asked by the people whether defendant had ever caused decedent's arrest, to show defendant's ill will toward deceased.—People v. Bowser, N. Y., 89 N. E. 818.

54. Criminal Law—Accessory After the Fact.

—One assisting in secreting decedent's body after death is not a principal, but is liable only as an accessory after the fact.—People v. Farmer, N. Y., 89 N. E. 462.

55. Criminal Trial—Custody Pending Appeal.—It is essential that accused be in custody pending his appeal by being confined, or, constructively, by being admitted to bail.—Tyler v. State, Okla., 104 Pac. 919.

56.—Record Destroyed.—Where the record necessary for a review is lost or destroyed, without possibility of substitution, a new trial will be granted.—Bailey v. United States, Okla., 104 Pac. 917.

57. Damages—Injury to Wife.—Where a married woman is a housekeeper, it is not necessary to prove her earning power to entitle her to recover damages for permanent injuries.—City of Louisville v. Tompkins, Ky., 122 S. W. 174.

58.—Profits.—Where a buyer of coal claimed damages for the seller's default in delivery, an instruction, authorizing recovery of lost profits by the buyer, failing to take into account his duty to purchase the deficiency elsewhere, held properly refused.—Pittsburgh Coal Co. v. Northy, Mich., 123 N. W. 47.

59.—Proximate Cause.—In a personal injury action against a street car company, it was proper to permit the jury to determine how far subsequent injuries to plaintiff delayed his recovery.—Ducharme v. Holyoke St. Ry. Co., Mass., 89 N. E. 561.

60.—Death.—In an action for killing of a boy under age, some proof of the probable cost of maintenance during minority is indispensable, that the item should be deducted from his probable earnings.—Peters v. Bessemer & L. E. R. Co., Pa., 74 Atl. 61.

61. Death by Wrongful Act—Theory of Statutory Right to Sue.—Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for wrongful death, held not to create a new cause of action, but to simply transmit one theretofore existing and which would otherwise have abated on the death of the injured party.—St. Louis, I. M. & S. R. Co. v. McNamara, Ark., 122 S. W. 102.

62. Deeds—Setting Aside.—That division of property made by a parent between children regarded apparently with equal affection is not equal is not sufficient ground for disturbing it.—Beadle v. Anderson, Mich., 123 N. W. 8.

63. Descent and Distribution—Real Estate.—Real estate purchased with the proceeds of inherited property is held by purchase.—In re Hullett's Estate, Ind., 89 N. E. 509.

64.—Widow's Inheritance.—Where all debts of an estate were paid, held proper for the court to award in kind to the widow of the decedent, who died childless, one-half of the shares of stock in a certain corporation.—In re Vernon's Estate, Pa., 74 Atl. 236.

65. Divorce—Compromise by Allowing of Alimony.—Where an attorney compromised a suit without authority by accepting a less amount of alimony than awarded his client, the client, upon learning thereof, must either ratify or disaffirm it, and, on disaffirming, must occupy the same position as before the compromise.—Sebastian v. Rose, Ky., 122 S. W. 120.

66. Drains—Order Establishing Ditch.—Under Gen. St. 1901, § 2538, held, that an order establishing a drainage ditch cannot be held

vold upon collateral attack because no formal finding of its necessity has been recorded.—*Bonnewell v. Lowe*, Kan., 104 Pac. 853.

67. **Easement's—Intangible Right.**—There is a distinction between actions to recover an intangible right and to recover possession of the land, and an action at law will not lie in the first instance.—*Le Blond v. Town of Peshtigo*, Wis., 123 N. W. 157.

68. **Ejectment—Payment of Taxes as Proof of Ownership.**—Proof that land was assessed for taxes in the name of one person, and the taxes paid by him, held not sufficient to establish ownership in him so as to sustain a recovery of the land against the holder of a *prima facie* title in possession.—*Maney v. Burke*, Ark., 122 S. W. 111.

69. **Embezzlement—Treasurer of a Society.**—The treasurer of a society may be a servant of the society, and as such guilty of embezzlement of its funds.—*Faggard v. State*, Okla., 104 Pac. 930.

70. **Eminent Domain—Compensation.**—In estimating the value of certain land taken in condemnation proceedings, held proper to consider its availability for sale as building lots.—*Catlin v. Northern Coal & Iron Co.*, Pa., 74 Atl. 56.

71.—**Improvements After Condemnation.**—A house planted on property after the commencement of street opening proceedings, so that it could not be relocated on the lot, should be regarded as personal property in the assessment of damages for taking the part of the lot required for the street.—*In re Briggs Ave. in City of New York*, N. Y., 89 N. E. 814.

72. **Estoppel—By Deed.**—One is estopped to show that he did not own what he assigned.—*Marshall Engine Co. v. New Marshall Engine Co.*, Mass., 89 N. E. 548.

73.—**Pleading.**—The doctrine of estoppel in pais, while of equitable origin, is by the modern practice generally applied in action at law, and facts constituting such an estoppel against a defendant may properly be pleaded in a complaint.—*Kellogg-Mackay-Cameron Co. v. Havre Hotel Co.*, U. S. C. C. of App., Ninth Circuit, 173 Fed. 249.

74.—**Subsequent Deed.**—A subsequent deed subject to an easement created by reservation in a prior deed held not to estop complainant from denying defendant's right to exercise the easement reserved after it had become extinguished.—*Percival v. Williams*, Vt., 74 Atl. 321.

75. **Evidence—JUDICIAL NOTICE.**—The court will take judicial notice that jurors generally view with suspicion testimony of an interested party and attach to it much less weight than would be given to the testimony of a disinterested witness.—*Sluman v. Dolan*, S. D., 123 N. W. 72.

76.—**Other Offenses.**—In a prosecution for shooting a policeman in defendant's endeavor to escape after committing a highway robbery, evidence of the robbery was admissible to show motive and intent in killing the policeman.—*People v. Morse*, N. Y., 89 N. E. 816.

77.—**Parol Evidence.**—A note may be shown by parol or other extrinsic evidence not to constitute a contract because of the nonperformance of a condition concerning which the writing is silent.—*Heitman v. Commercial Bank of Savannah*, Ga., 65 S. E. 590.

78.—**Positive and Negative.—Testimony of** certain witnesses that they were not annoyed by odors from defendant's rendering plant did not overcome positive proof that complainant and others were nauseated by such odors.—*Rausch v. Glazer*, N. J., 74 Atl. 39.

79. **Executors and Administrators—Sale, Authorization Of.**—Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale.—*Haring v. Shelton*, Tex., 122 S. W. 18.

80. **False Imprisonment—Procuring Arrest.**—While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.—*Campbell v. Hyde*, Ark., 122 S. W. 99.

81. **Federal Courts—Federal Question.**—Federal jurisdiction on the theory that the action involves a federal question must appear from complainant's statement of his own cause of action.—*Huff v. Union Nat. Bank of Oakland*, U. S. C. C., N. D. Cal., 173 Fed. 333.

82. **Ferries—Passenger.**—A woman who fell from the gangplank of a ferry boat as she was about stepping on board, by reason of the starting of the boat, and was drowned, held to have been a passenger, and the owner of the boat held liable for her death.—*Riley v. Vallejo Ferry Co.*, U. S. D. C., N. D. Cal., 173 Fed. 331.

83. **Fire Insurance—Exchange of Property.**—An insured having an equitable insurable interest in property at the time of loss held not to lose his right by subsequently completing negotiations previously begun for the exchange of the insured property.—*Bartling v. German Mut. Ins. Co.*, Iowa, 123 N. W. 63.

84. **Fixtures—Agreement.**—An agreement that a building affixed to land should remain personal property may be shown by evidence of the subsequent admissions and dealings of the parties.—*Searle v. Roman Catholic Bishop of Springfield*, Mass., 89 N. E. 809.

85. **Fraud—No Intention to Perform.**—Under Rgv. Codes, § 5072, section 5073, subd. 4, held that a party to a contract may recover damages for deceit, on proving that the adverse party entered into the contract without any intention of performing his part of it.—*Kelly v. Ellis*, Mont., 104 Pac. 873.

86. **Frauds, Statute Of—Executed Oral Agreements.**—If defendant transferred land certificates to plaintiff pursuant to an oral agreement between them to exchange the certificates for land, there was an executed oral contract, so that, to recover damages for breach of agreement to convey upon plaintiff's ouster by one to whom defendant had previously transferred the land, plaintiff need not show any oral warranty of title.—*Ross v. Saylor*, Mont., 104 Pac. 864.

87.—**Part Performance.**—An oral agreement to convey land is taken out of the statute of frauds by the vendee's taking possession of the land and paying the consideration.—*Collins v. Leary*, N. J., 74 Atl. 42.

88. **Fraudulent Conveyances—Proceedings at Law.**—Where a transaction is voidable as to creditors, and they do not need the use of equity jurisdiction, or any relief peculiar thereto, held, that they may proceed at law.—*Atlanta & Walworth Butter & Cheese Ass'n v. Smith*, Wis., 123 N. W. 106.

89.—**Purchase in Wife's Name.**—If defendant's husband furnished the purchase money of property, title of which was taken in the name of plaintiff's grantor because defendant's husband was financially embarrassed, such transaction would be a fraud upon his creditors, so that neither defendant nor her husband could rely on it to claim the property, especially as against plaintiff, a bona fide purchaser.—Belcher v. Belcher, 119 N. Y. Supp. 144.

90.—**Simulations.**—Acts of sale to certain of seller's heirs held, under the evidence, not to be simulations.—Byrd v. Pierce, La., 50 So. 452.

91. **Highways—User Does Not Change Boundaries.**—Where a road was traveled only upon the west side of a section line, which was the center of a road four rods wide, it would not operate to change the limits of the road as originally laid out.—Olwell v. Travis, Wis., 123 N. W. 111.

92. **Husband and Wife—Sale to Wife.**—Where a wife acquired good title to a horse by gift from her husband, one to whom she sold it held to also acquire good title notwithstanding the exception in P. S. 3040.—Walston v. Allen, Vt., 74 Atl. 225.

93.—**Separate Estate.**—A married woman cannot make a valid conveyance of her separate real estate by a deed to her husband, which she alone signs, seals and acknowledges, and which he accepts and puts on record.—Wicker v. Durr, Pa., 74 Atl. 64.

94. **Indictment and Information—Sunday Violation.**—In a prosecution for keeping open a barber shop on Sunday, the state was not required to either allege or prove that it was not a work of necessity or charity.—Stark v. Backus, Wis., 123 N. W. 98.

95. **Infants—Release.**—Release signed by minor shortly after the accident accepting a comparatively nominal sum in settlement of her injuries held not binding on her.—Hollinger v. York Rys. Co., Pa., 74 Atl. 344.

96. **Injunction—Multiplicity of Suits.**—Where trespasses are continuous so that numerous actions would be necessary to relieve against them, equity will interfere to prevent a multiplicity of suits; the legal remedy being inadequate.—Le Blond v. Town of Peshtigo, Wis., 123 N. W. 157.

97.—“**Rogues’** Gallery Photographs.—Persons whose photographs were taken by officers of the law for purposes of identification held not entitled to maintain an injunction, without showing specifically that the pictures are to be used improperly.—Mabry v. Kettering, Ark., 122 S. W. 115.

98. **Insane Persons—Appeal.**—The nonresident sister of an incompetent held not a “person aggrieved,” within St. 1898, § 4031, and entitled to appeal from an order dismissing her petition for the appointment of a guardian.—In re Carpenter, Wis., 123 N. W. 144.

99. **Insolvency—Action on Bond.**—The court in which insolvency proceedings are pending has original jurisdiction of an action on the bond given by the debtor for the release of the property.—Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co., La., 50 So. 612.

100. **Intoxicating Liquors—Revoking License.**—A conviction of permitting gambling in a bar-room, in violation of Act No. 176, p. 242, of 1908, § 10, had at the same time as a conviction of selling liquor to a minor in violation of section 6, held a second conviction of violation of the act, within section 8, warranting a revocation of defendant's license.—State v. Apfel, La., 50 So. 613.

101. **Judgment—Merger.**—A mortgage note having been merged in a judgment thereon, a proceeding to foreclose the mortgage should be founded on the judgment rather than on the note.—Rossiter v. Marriman, Kan., 104 Pac. 858.

102. **Landlord and Tenant—Right of Egress.**—Under a lease of a room in a hotel, held there was no implied right to use a door from it into the rotunda.—Jemo v. Tourist Hotel Co., Wash., 104 Pac. 820.

103. **Larceny—Allegation of Possession.**—An indictment for theft must aver possession of the property stolen, and that it was taken from the possession of the owner or person holding for him, and in submitting that issue it must be substantially in the terms of the indictment.—Eubanks v. State, Tex., 122 S. W. 35.

104.—**Intent.**—To constitute larceny, a felonious intent to deprive the possessor of the property taken is essential, which may be inferred where the taking was accomplished by artifice or fraud, or was accompanied by acts of concealment.—Farrell v. Phillips, Wis., 123 N. W. 117.

105. **Libel and Slander—Malice.**—The presumption of malice arising from the publication of an article libelous per se does not prevent defendant from showing absence of malice to prevent recovery of exemplary damages.—Rocky Mountain News Printing Co. v. Fridborn, Colo., 104 Pac. 956.

106.—**Publication.**—To recover for a libelous publication, it must appear, not only that it was written of and concerning plaintiff, but also that it was so understood by some third person who read or heard the words.—Dunlap v. Sunder, Wash., 104 Pac. 830.

107. **Mandamus—To Inspect Books.**—The remedy of a stockholder, denied permission to inspect the corporate books, held to be by mandamus, and not by mandatory injunction.—Brown v. Crystal Ice Co., Tenn., 122 S. W. 84.

108. **Master and Servant—Degree of Care.**—A master is not answerable for a failure to avoid peril that could not be foreseen by one in like circumstances by the exercise of reasonable care.—Nordstrom v. Spokane & I. E. R. Co., Wash., 104 Pac. 809.

109.—**Injury to Another's Servant.**—Gas company held liable in damages to a workman of a person engaged in improving a street, injured by an explosion of gas.—Dieble v. United Gas Improvement Co., Pa., 74 Atl. 349.

110.—**Negligence.**—A railroad company is not guilty of negligence in the construction of a switchyard, because at certain points the cars could not clear.—Peters v. Bessemer & L. E. R. Co., Pa., 74 Atl. 61.

111. **Mechanic's Liens—Laches.**—Under the direct provisions of Ballinger's Ann. Codes & St. § 5953 (Pierce's Code, § 6077), a lien claimant has three years in which to assert his lien, and there can be neither laches nor estoppel while he is within the time given by the statute.—Fairbanks-Morse Co. v. Union Bank & Trust Co., Wash., 104 Pac. 815.

112. **Mortgages—Suing On Coupons.**—A bondholder having unpaid coupons can sue thereon, though the bond limits the rights of ac-

tion to the trustee in the trust agreement under which the bonds were issued.—*Mack v. American Electric Telephone Co., N. J.*, 74 Atl. 263.

113. **Municipal Corporations—Assessments for Improvements.**—That the assessment of benefits for property taken for a street was nearly equal to the compensation awarded or particularly excessive and unjust held immaterial, in the absence of actual fraud, or bad faith in fixing the assessment district.—*Roberts v. City of Sandusky, Mich.*, 123 N. W. 39.

114.—**Dangerous Streets.**—If a traveler, in the exercise of reasonable care, does not know that a street is in a dangerous condition, he may assume that the city has done its duty to keep it reasonably safe.—*Schelich v. City of Wilmington, Del.*, 74 Atl. 267.

115.—**Income From Street Assessments.**—The power of a city to grade streets, lay sewers or water pipes at the cost of abutting property held not a governmental function, but a power in its proprietary character, and the funds collected from the abutting property owners are not moneys of the city within its charter.—*City of Seattle v. Stirrat, Wash.*, 104 Pac. 834.

116.—**Liability for Street Construction.**—Where a city, contracting for the construction of a local improvement at the cost of property benefitted thereby, permitted its comptroller to receive money in carrying out the work, the city must answer for his malfeasance.—*City of Seattle v. Stirrat, Wash.*, 104 Pac. 834.

117.—**Liability of Trustees.**—Materialmen held entitled to recover of trustees of villages who failed to take a bond for their benefit from the contractor for a village building, as required by Comp. Laws 1897, §§ 10743-10745, notwithstanding moral obligation of village.—*Michaels v. McRoy, Mich.*, 123 N. W. 37.

118.—**Public Park a Public Utility.**—Public park held a public utility within Const. art. 10, § 27, authorizing a city to become indebted in a larger amount than that specified in section 26, to purchase or construct public utilities or repair the same.—*City of Ardmore v. State, Okla.*, 104 Pac. 973.

119. **Negligence—Wanton Injury.**—Where defendant's act resulting in an injury is willful, the defense of contributory negligence is inapplicable.—*Hawks v. Slusher, Ore.*, 104 Pac. 883.

120. **Nuisance—Cornice.**—A purchaser of a new building, on which a cornice was maintained so as to create a nuisance on adjoining property, held not liable for injury caused by the nuisance.—*Neuman v. Steuer*, 119 N. Y. Supp. 168.

121. **Officers—Extension of Term.**—The holding over period of an office does not have the effect of extending the term succeeding.—*State v. Hingle, La.*, 50 So. 616.

122. **Partnership—Firm Accounts.**—Partners could only recover money due them from one of the firm in the course of the firm business after a full settlement had been made and the amount due ascertained.—*Kwapil v. Bell Tower Co., Wash.*, 104 Pac. 824.

123. **Patents—Patentable Combination.**—To constitute a patentable combination of old elements, they must by their joint action produce a new and useful result, or an old result in a cheaper or otherwise more advantageous way.—*Gaines v. Alabama Consol. Coal & Iron Co., U. S. D. C. N. D. Ala.*, 173 Fed. 303.

124. **Payment—Appropriation by Debtor.**—A payment by mortgagor on account thereof can-

not be withheld by the creditor for other bills owing by mortgagor.—*Marsh v. Vanness, N. J.*, 74 Atl. 47.

125. **Perpetuities—Beginning at End of Period.**—Interest in property held not obnoxious to the rule against perpetuities, if beginning within a life in being and 21 years thereafter, though it may extend beyond.—*Bender v. Bender, Pa.*, 74 Atl. 246.

126. **Pleading—Contradictory Allegations.**—Allegations in pleadings may be contradictory, and yet not give rise to an estoppel.—*State v. Hingle, La.*, 50 So. 616.

127.—**Real Party in Interest.**—Rule that a person, holding title to a chose in action as security, must sue to enforce it as the real party in interest, held not to apply where a labor lienor transferred his claim for collection only.—*Matzewitz v. Wisconsin Cent. Ry. Co., Wis.*, 123 N. W. 121.

128. **Quo Warranto—At Relation of Private Citizen.**—Under P. S. 1973, a private citizen held without capacity to maintain a quo warranto proceeding to compel a citizen to show by what authority he is exercising a license to sell intoxicating liquors.—*Brown v. Alderman, Vt.*, 74 Atl. 230.

129.—**Estoppel.**—Relator, in quo warranto to test the right of defendant to hold over an office, held estopped by his position in his pleading to insist that the defendant should test his right to hold the office by some independent proceeding.—*State v. Evans, Tenn.*, 122 S. W. 81.

130.—**Failure to Take Oath.**—In quo warranto to test defendant's right to hold over the office of superintendent of public schools, relator cannot contend that defendant was a usurper, in that he did not take an oath to support the Constitution, where it does not affirmatively appear that such oath was not taken.—*State v. Evans, Tenn.*, 122 S. W. 81.

131.—**Right to Office.**—The right to the office of a director in a domestic corporation may be tried by quo warranto in the name of the state on the relation of the Attorney General.—*State v. Brooks, Del.*, 74 Atl. 37.

132. **Rape—Failure to Make Complaint.**—On a trial for rape, the refusal to charge on the failure to make immediate complaint accompanied by subsequently treating accused in a friendly manner held erroneous.—*Jackson v. State, Ark.*, 122 S. W. 101.

133. **Railroads—Gates at Crossing.**—That the gates at a railroad crossing are up when a traveler approaches with the fact that a train was standing held, to give the traveler assurance of safety in driving on the track.—*Rademacher v. Detroit, G. H. & M. Ry. Co., Mich.*, 123 N. W. 45.

134. **Release—Improper Representations.**—The fact that a physician may have unintentionally misrepresented to an injured person his true condition does not of itself prevent the avoidance of a release of liability for the injury, if such representations were untrue, were made in the interest of the company released, and would induce the injured person to sign the release.—*Pattison v. Seattle, R. & S. Ry. Co., Wash.*, 104 Pac. 825.

135. **Railroads—Receiver.**—A mortgagee of the property of a railroad company, to which its income is also pledged by the mortgage, is not entitled to such income until it takes or demands possession of the property or secures the appointment of a receiver.—Central Trust

Co. of New York v. Mobile, J. & K. C. R. Co., U. S. C. C., S. D. Ala., 173 Fed. 330.

136.—**Speed Over Crossings.**—The speed of a train over a highway crossing in the open country, however great, is not negligence per se.—*Phelps v. Erie R. Co.*, 119 N. Y. Supp. 141.

137. **Sales—Conditional Sales—Failure to Advertise.**—Failure to advertise the sale of property sold on condition, on default by the buyer, in the manner provided by Acts 1889, p. 117, c. 81, § 1, held to rescind the contract, so that, under section 4, the seller could not recover the purchase price.—*J. I. Case Threshing Mach. Co. v. Watson*, Tenn., 122 S. W. 86.

138.—**Place of Sale.**—Where a foreign corporation sued for the value of goods alleged to have been delivered in Wisconsin, and the proof showed a sale and delivery in New York, the variance was fatal.—*Warner Instrument Co. v. Sweet*, 119 N. Y. Supp. 166.

139.—**Rescission.**—The buyer of goods who has given drafts for the purchase price could rescind and cancel the contract for fraud in inducing to purchase, notwithstanding a bond indemnifying him against loss under the contract.—*Johnson County Sav. Bank v. Renfro*, Tex., 122 S. W. 37.

140.—**Subject of Conditional Sale Destroyed by Fire.**—Where a cash register is delivered under a contract of conditional sale and a note given for the price, and same is destroyed by fire, the purchaser is liable on the note.—*National Cash Register Co. v. South Bay Club House Ass'n*, 118 N. Y. Supp. 1044.

141. **Statutes—Modification of Common Law Rules.**—The rules of the common law are not to be changed by doubtful implication in statutes nor overturned except by clear and unambiguous language in the statute.—*State v. Hilldredt*, Vt., 74 Atl. 71.

142. **Street Railroads—Care Required.**—The employees in charge of street cars must use reasonable care to see that the cars move at a reasonable speed, and stop, if necessary, where danger of collision is imminent.—*Lenkewicz v. Wilmington City Ry. Co.*, Del., 74 Atl. 11.

143.—**Duty Toward Passengers.**—It is the duty of a street car company to stop to take on or let off passengers, the time of stoppage being such as to enable the passenger to reach a place of safety, either on the street or in the car before it is started.—*Battie v. Detroit United Ry.*, Mich., 122 N. W. 557.

144.—**Injury to Passenger.**—One boarding a street car held not, as a matter of law, guilty of negligence.—*Ryan v. Pittsfield Electric St. Ry. Co.*, Mass., 89 N. E. 527.

145.—**Negligence.**—If a street car was just starting, the attempt of a woman incumbered with bundles to board it would not constitute negligence as matter of law.—*Payne v. Springfield St. Ry. Co.*, Mass., 89 N. E. 536.

146. **Subrogation—Persons Making Advances.**—A person who had advanced money to pay the debts of an estate held not within any of the classes of persons entitled to subrogation as against the interests of remainders.—*Brown v. Hooks*, Ga., 65 S. E. 780.

147. **Taxation—Exemptions.**—Delegated power to levy a tax on all property within a district held not to extend to property coming into existence under constitutional exemption from taxation.—*Louisiana Ry. & Navigation Co. v. Madere*, La., 50 So. 609.

148.—**Franchises.**—A tax on a franchise of a gas company held not a privilege tax imposed on the right to be a corporation.—*Commonwealth v. Louisville Gas Co.*, Ky., 122 S. W. 164.

149.—**Tax Deed.**—That judgment was rendered in tax foreclosure proceedings for a larger amount of interest than was due held not ground for avoiding the sale collaterally.—*Timmerman v. McCallagh*, Wash., 104 Pac. 212.

150. **Telegraphs and Telephones—“Business Service.”**—The words “business service,” in a telegraph company's franchise fixing rates, do not include service rendered to a telegraph company under a joint traffic arrangement.—*East Tennessee Telephone Co. v. City of Harrodsburg*, Ky., 122 S. W. 126.

151. **Torts—Damages.**—A civil action for damages by a party to a former action against a

witness therein for alleged willful and false testimony resulting in plaintiff's defeat does not lie either at common law or by statute.—*Godette v. Gaskill*, N. C., 65 S. E. 612.

152.—**Fright of Horse.**—Where plaintiff's horse was frightened and ran away as the result of an altercation between plaintiff and defendant, plaintiff's omission to tie the horse held no defense to defendant's liability for resulting injuries.—*Hawks v. Slusher*, Ore., 104 Pac. 883.

153. **Trial—Exceptions.**—It is not proper practice to merely “except” to an instruction when given, stating reasons, as the particular objections should be stated when the instruction is given, and, if overruled, an exception should then be reserved.—*Ross v. Saylor*, Mont., 104 Pac. 864.

154. **Trover and Conversion—Note Conditionally Delivered.**—The maker of a note delivered on condition, may recover the note in trover from the payee where he has broken the condition.—*Thompson v. Carter*, Ga., 65 S. E. 599.

155. **Vendor and Purchaser—Mistake.**—To warrant the rescission by a court of equity of an executed contract for the sale of property on the ground of mutual mistake, the mistake must be material and so important that, if it had not been made, complainant would not have made the contract.—*Murray v. Paquin*, U. S. C. C. W. D. N. Car., 173 Fed. 319.

156.—**Vendor's Performance.**—A purchaser suing at law to recover damages for default in contract of sale, must allege performance of all conditions on his part to be performed.—*New York City Estates Co. v. Central Realty Co.*, 118 N. Y. Supp. 1054.

157. **Warehousemen—Negotiability of Receipts.**—Mere delivery of warehouse receipt, without indorsement, held to transfer title to the goods.—*National Union Bank of Reading v. Shearer*, Pa., 74 Atl. 351.

158. **Waters and Water Courses—Dams.**—The doctrine *de minimis non curat lex* held not to apply in a suit by a town to enjoin the maintenance of a dam attached to a highway bridge.—*Town of Bristol v. Palmer*, Vt., 74 Atl. 332.

159.—**Diversion.**—Water flowing in a well-defined water course cannot, except in the exercise of eminent domain, be diverted on the lands of an adjoining proprietor.—*Kane v. Bowden*, Neb., 123 N. W. 94.

160.—**Easement in a Water Power.**—An easement in a water power created by reservation which was not an easement appurtenant constituted an easement in gross in the absence of a dominant tenement, and during its existence was an interest in the land itself, assignable, descendible, and devisable.—*Percival v. Williams*, Vt., 74 Atl. 321.

161. **Wills—Creation of Joint Tenancy.**—A joint tenancy exists where two or more have joint ownership of property with unity of interest, title, time, and possession, and at common law a devise to two or more without limitations creates a joint tenancy in absence of words or circumstances showing a contrary intention.—*Gaunt v. Stevens*, Ill., 89 N. E. 812.

162.—**Declarations of Testator.**—Oral or written declarations of a testator, made subsequent to the execution of his will, as to the meaning thereof or his object in making it, are inadmissible to contradict or vary its terms.—*Sibley v. Maxwell*, Mass., 89 N. E. 232.

163.—**Legatee Suing on Testator's Note.**—A legatee to whom the executors have assigned as part of his share a negotiable note executed to testator occupies the same position as testator in suing thereon.—*O'Day v. Sanford*, Mo., 122 S. W. 3.

164.—**Testamentary Capacity.**—Testatrix having sufficient mental power to remember the particulars of her business affairs so as to understand their obvious relations, etc., had testamentary capacity.—*In re Mullan's Will*, Wis., 122 N. W. 723.

165. **Witnesses—Re-examination.**—Where prosecutrix made inconsistent statements on cross-examination, it was not an abuse of discretion for the court to permit the prosecuting attorney on re-examination to call her attention thereto and ask for an explanation.—*People v. Rigby*, Cal., 104 Pac. 945.

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PURCHASE BY CORPORATIONS OF THEIR OWN STOCK AND STATUS OF PURCHASERS TO THEIR CREDITORS.

A very late case, decided by the Supreme Court of Wisconsin, is based on the rule established in that jurisdiction "by a long line of decisions that in the absence of a plain statutory prohibition to the contrary * * * * a corporation may, in general, so long as it acts in good faith by authorization of its governing body, lawfully purchase its own stock, either as to stockholders or present or future creditors, and without such authorization its officers, may, acting in good faith, do so as regards consenting stockholders or such creditors." Atlanta, etc., Ass'n v. Smith, 123 N. W. 106.

The rule thus stated carries the strongly implied fact, that such a transaction does not come within the ordinary powers of an officer of a corporation, because presumably this is a matter not within the general conduct of corporate business. The purchase by officers would rest for validity not in power so much as on estoppel.

The court then conceding "that the common law rule in England and the judicial rule in a number of states is" contrary to the Wisconsin rule, asserts that the latter "has the support of many state and federal courts," and various cases are cited.

What strikes us just here is to ask why there is spoken of "the *common law* of England and the *judicial rule* in a number of states?" If a number of states follow the common law of England, and others do not it would seem more natural to say that the

latter were following a "*judicial rule*" and the former were administering and applying the common law—as much the law of a state when not superseded by statute, if suitable to its conditions, as is a statute.

We find it stated in sec. 309 of Cook on Corporations (6th Ed.), that: "In England a long line of decisions has established the rule that at common law, a corporation cannot purchase shares of its own capital stock. This rule is clear and decisive in that country and is closely adhered to." The citations given, and they are numerous, do not extend back over sixty years and, therefore, are not of so much weight as authority with us, as if they antedated the revolution. But it does seem, that, if the question of suitability to conditions is eliminated, and statutes or constitutions do not affect the inquiry, the American courts, just as English courts, should consult and be controlled by whatever the common law prescribes in this regard, if anything.

The Wisconsin court speaks, as if a general principle of law had been established, but looking at the cases it cites on that line, this would not appear to be true. Thus in Shoemaker v. Lumber Co., 97 Wis. 294, the decision turned upon the statute; the objectors were not present creditors and there was unanimous consent by stockholders. The later cases of Calteaux v. Mueller, 102 Wis. 525; Marvin v. Anderson, 111 Wis. 387; Pabst v. Goodrich, 133 Wis. 43, and Gilchrist v. Highfield, 123 N. W. 102, merely followed the Shoemaker case.

In Burnes v. Burnes, 137 Fed. 781, the Eighth Circuit Court of Appeals, speaking through Sanborn, C. J., said: "In the absence of constitutional or statutory prohibition, corporations have the inherent power to buy, to sell and retire their own stock," and to this he cites a number of cases,

among others that of Commissioners v. Thayer, 94 U. S. 631. This case merely states the same principle and cites as authority, City Bank v. Bruce, 17 N. Y. 507. Judge Selden, speaking of stock surrendered to a corporation for indebtedness to it, said: "I am not aware of any common law principle which forbids it, nor is it shown to have been in contravention of any provision of the charter of the company, or any other of the statutes of Ohio. In the case of Taylor v. Exporting Co., 6 Ohio, 83, it was held that a bank might receive its own stock in payment of a debt, and might hold it as its other corporate property." The New York case was decided in 1858, and, filtered through discussion in a federal Supreme Court opinion, has come to have expression as above by Judge Sanborn.

We see that the New York case goes upon the theory that the common law did not forbid such a purchase and courts have come to ignore that thought in their announcements.

But all the courts which admit this power in a corporation seem not to place the seller of his stock in a corporation in a very satisfactory position and good business principles would make it appear to his advantage to deal with any other buyer. This seems so patently true, that a presumption of fraud would nearly, if not quite, inhere in any individual transaction not coming within a class of sales, or where there were no surrounding circumstances taking the transaction out of the ordinary course of dealing between individuals.

Thus, if the corporation happens to be insolvent, the seller may be compelled to restore the consideration. Buck v. Ross, 68 Conn. 129. If corporate creditors are injured, the transaction may be avoided. Clapp v. Anderson, 104 Ill. 26. It does not matter whether the transaction was in

good faith on both sides or not, nor whether the corporation was apparently solvent or not. If it is insolvent in fact the seller is liable to creditors. Fitzpatrick v. McGregor (Ga.), 65 S. E. 859.

The case we start out with announces, that the trust fund doctrine, that assets of a corporation are such for creditors, is not recognized in Wisconsin as to a going corporation, and, yet, that court distinguishes a purchase of stock by a corporation, so as to take it out of the general rule, that "a transfer of property in fraud of future creditors" is to be avoided "only in case of actual intent to defraud them," which is the rule recognized in Wisconsin. It is said such a rule is too restrictive in application to such a transaction, because "the duty of a stockholder not to deplete for his advantage corporate assets below the subscribed capital and become a party to a continuance of solvent appearance supplies the need of actual intent to defraud, where the natural and probable effect is to prejudice persons subsequently dealing with the corporation as solvent, condemning the transaction for want of that good faith necessary to sustain a purchase by a corporation of its own stock, while at the same time, so far as necessary to fully protect the rights of creditors, the doctrine of estoppel applies to prevent the stockholder from claiming, to effect, that his relations as such holder were terminated by such transaction."

This seems worked out somewhat laboriously, but, in its final analysis, it shows, that, generally, it is not proper, that a corporation should reduce its capital stock by purchasing its own shares. There is no absolute finality to the transaction. It is subject to inquiry, even though there is no actual intent to defraud future creditors, and, *a fortiori*, it should be as to existing creditors.

With such possible consequences it might be presumed, very justifiably, that fraud exists where a corporation buys its own stock and the burden of establishing the contrary ought to be cast on the seller.

NOTES OF IMPORTANT DECISIONS.

PENSION MONEY—EXEMPTION FROM GARNISHMENT UNDER FEDERAL STATUTE.—The case *In re Fergusson's Estate*, 123 N. W. 123, decided by Supreme Court of Wisconsin, shows a very interesting collation of decisions, and their discussion regarding the limit of the exemption granted by federal statute to pension money. In that state, in Iowa, in Kentucky and Vermont, there has been oscillation from one side to the other for a considerable period of time, all antedating construction of such statute in *McIntosh v. Aubrey*, 185 U. S. 522.

The statute provides that: "No sum of money due or to become due to any pensioner shall be liable to attachment, levy or seizure by or under any legal or equitable process whatever, whether the same remain with the pension office, or any officer or agent, or in course of transmission to the pensioner entitled thereto, but shall inure wholly to the benefit of such pensioner."

The *McIntosh* decision says very tersely: "The section of itself seems to present no difficulty. * * * We think the purpose of congress is clearly expressed. It is not that pension money shall be exempt from attachment in all of its situations and transmutations. It is only to be exempt in one situation, to-wit: When due or to become due. From that situation the pension money (having been paid to the pensioner and converted into other property) had departed."

The state courts had varied in decision both as to moneys subject to identification and as to proceeds of its investment—some holding that exemption extended no further than to identification in specie, and others that congressional intent extended to its proceeds.

Now, however, that the federal supreme court has settled all controversy, it may be thought its construction of that statute is as narrow as narrow can be. It seems to present this situation: If the pensioner collects and deposits his money in bank, it can be seized by attachment, while if he lets it remain, however indefinitely, with the government it cannot be, and the money is to "inure wholly to the benefit of such pensioner." In other words, before it begins to "inure" etc., it is safe, and when it inures, by being collected, it becomes endangered. That money looks something like the viands of a Barmecide feast or dead sea apples to the taste, so far as what the statute attempts to do is concerned.

We do not know whether the supreme court was affected by a sort of obscurism from consideration of the principle in the liquor

cases, where the commodity becomes subject to state laws when it has been effectually delivered to the consignee, but it seems to us there is reason for a distinction. Liquor may be made a sort of outlaw under police power, but we cannot conceive that so may pension money.

RECEIVER—EQUITABLE EXECUTION BY APPOINTMENT OF A RECEIVER.—Receivership being a remedy originating in chancery, the question has arisen in England whether statutory recognition, even where couched in the broadest possible terms, enlarges the operation of the remedy. The decision in the recent English case of *Edwards v. Picard*, L. R. (1909) 2 K. B. 903, answers this question in the negative. Moulton, L. J., however, dissented, basing his dissent on the statutory authorization to appoint a receiver whenever it shall appear "just or convenient."

In this case the question was whether a receiver of profits of patents would be appointed by way of equitable execution. Now under the practice of the old court of chancery an appointment by way of equitable execution was only made where legal execution would have been possible but for some impediment which rendered it fruitless; and this was shown by the fact that the plaintiff, before he applied for a receiver, had to sue out an elegit. If there were legal impediments to enforcing the elegit, then the receiver would be appointed, but it was essential that the property should be such as, but for the legal impediments, would have been the proper subject of legal execution. Since the Judicature Acts the procedure for obtaining the appointment of a receiver has been simplified, but it has been held that the jurisdiction to make the appointment has not been enlarged, and that it will only be made in cases where a receiver by way of equitable execution would have been appointed before the Judicature Acts. *Holmes v. Millage* (1893), 1 Q. B. 551.

In commenting on this decision, the Solicitor's Journal (London) remarks:

This construction excludes the appointment in the case of a patient, at any rate if—as in the present case—it is not actually producing revenue. At first sight, this seems to be in conflict with the words of section 25 (8), which enable a receiver to be appointed "in all cases in which it shall appear to the court to be just or convenient;" and undoubtedly the Court of Appeal in *Holmes v. Millage* placed a restriction on the natural meaning of the words. "Just or convenient" are as wide as possible; there is no reference to the previous practice of the Court of Chancery; and as Moulton,

L. J., dissenting, pointed out in the present case, it would have been unnecessary to use them if the intention was only to preserve the previous jurisdiction. His protest is of no immediate effect, and the policy of Holmes v. Millage has been affirmed by the majority of the court in Edwards v. Picard. But a protest, though not immediately effectual, may serve a useful end when the courts decline wide powers for the furtherance of justice conferred on them by the legislature."

JURORS—LIMITING OR ENHANCING RIGHT OF PEREMPTORY CHALLENGE.—The Supreme Judicial Court of Massachusetts recognizes in the case of Searle v. Roman Catholic Bishop of Springfield, 89 N. E. 809, the general principle, that no litigant has the right to a particular juror. But it regards the right of peremptory challenge as a substantial right and considers that equality in the exercise thereof should be conserved by trial courts as strictly as may be practicable.

In the above case the defendant held the property involved in a suit in trust for the Roman Catholic Church, and the trial court excluded from the panel all members of that creed, irrespective of the fact whether they belonged to the particular parish for whose benefit the property was used or not.

It was said that mere belief was not disqualification, and then it was considered by the court that exclusion therefor was material error.

The court thus discusses the value of the right of peremptory challenge:

"In general it may be assumed that all duly qualified jurors, against whom there cannot be a successful challenge for cause, will consider and try a case properly. But a man may have affiliations and friendships, or prejudices and habits of thought, which would be likely to lead him to look more favorably for the plaintiff, or less favorably for him, upon a case of a particular class, or upon one brought by a particular person or a member of a particular class of persons, than would the average juror, even though his peculiarities are not sufficiently pronounced to disqualify him for service. It is in reference to these peculiarities that the parties are given a limited number of peremptory challenges. While they have no direct right of selection, this right of peremptory challenge gives to each party a restricted opportunity for choice among qualified persons. Anything which renders this statutory right of peremptory challenge materially less valuable is an injury to a party, within the meaning of the statute."

It was said: "The order of the judge rejecting

these men, at the request of the plaintiff, gave him at the outset an additional power of choice, and made his right of peremptory challenge relatively more valuable, while the defendant's similar right was made relatively less valuable. We are of opinion that this was an injury to the defendant which entitles him to a new trial."

This distinction between an order regarding a class and with respect to an individual juror would appear to be a scound one.

ATTORNEY AND CLIENT—CRITICISM OF COURTS AS BAR TO REINSTATEMENT FOR WANT OF GOOD MORAL CHARACTER.—This journal annotated the case *In re Egan* at page 31 in 68 Cent. L. J. In that case, by decision rendered by North Dakota Supreme Court on October 8, 1908, Egan's name was stricken from the rolls and his license was cancelled. Mr. Egan's irrepressibility has since that time been somewhat more in evidence than ever before, and, while editing a newspaper in his Elba of newspaperdom, his onslaughts on the court were models of philippic literature, in which charges of political subserviency, corruption and ignorance danced in all the mazes of diatribe. He said his disbarment was a foregone conclusion, and that he was not repentant or conscious of any wrong-doing, and yet he applied to the same court for reinstatement. *In re Egan*, 123 N. W. 478.

The application for reinstatement, therefore, could have hoped for success only upon two theories: that the court in its previous judgment was corrupt and now were given a locus poenitentiae, or there was error of law which the court, on being better advised, would wish to correct, unless the disciplinary course entered upon met with defiance that was inconsistent with good moral character.

The court refused reinstatement, holding that this course showed the applicant was lacking in good moral character. This finding was bottomed also on a finding that these publications were maliciously made. That being so, any protestation on the part of the applicant that he believed his conduct was correct, was necessarily disbelieved, and we think it would be a strange thing for a court not to hold that the applicant, in attempting to bolster up malice or give it appearance of sincerity, by falsehood, was a moral derelict.

But it is also our view that for an attorney, who has been personally decided against by a court, to iterate and reiterate in publication, that the court is corrupt is worse than if he charged the same thing as to a judgment against his client. He takes an oath to demean himself as an attorney before and respecting courts, and, if he charges corruption day in and

day out, and institutes no proceedings directly against judges so charged, he is also a moral derelict, though a citizen not a lawyer might possibly not be so considered. Mr. Egan is described as a man of very superior ability, and, if he can abuse judges right and left and do nothing more, he should not be allowed to appear in courts as an attorney. When an attorney cannot be trusted by the courts in a professional way, he is not only a hindrance to the administration of law, but a peculiar expense to the public.

The publications in the Egan case were very different from that which was the basis of contempt and disbarment proceedings, as shown by the very recent case of *Pickle v. State*, of which advance publication of the opinion by Tennessee Court of Civil Appeals has been sent to us. The proceeding in the Tennessee Circuit Court seems as tyrannical an exhibition on the part of the judge as we remember ever to have seen, and his action, by every fair implication of language, was so considered by the court which reviewed the judgment of disbarment. The latter court said: "We are unable to see, after a most careful study of this case, and after a painstaking analysis of the article in question, that the defendant G. W. Pickle was, in writing and procuring the publication of this article, guilty of any act of impropriety or unprofessional conduct, inconsistent with the character and faithful discharge of his duties to his profession."

The judge who instituted the proceedings had exercised a sort of jurisdiction, which Mr. Pickle said many lawyers believed to be "usurpation," and his judgments were of questionable validity. A bill was pending to correct the supposed evil; the judge was active, as he admitted, in opposing it, and the respondent expressed the opinion that his influence as judge put some attorneys in duress, and otherwise they would be in favor of the bill passing. He published the article in reply to an editorial that the whole thing was a mere wrangle between attorneys, and argued that the bill was of great public interest. His position as to the judge being without jurisdiction was expressly so held by the Supreme Court.

What judge instituting such a proceeding would feel comfortable after this sort of language in a reviewing court about him: "For reasons we can well understand, the circuit judge placed a strained and unwarranted construction upon this article?" Or this: "Can it be said that he (Pickle) was guilty of any impropriety in stating that Judge Sneed was taking a part in this controversy," when he admitted that he was? Judge Sneed seemed to believe in the doctrine of *lese majeste*, but the upper court did not.

HUSBAND'S RIGHT OF CURTESY UNDER THE MARRIED WOMEN'S ACTS—THE HAGELUKEN CASE.

Some discussion having arisen in Missouri and in other states as to the force and effect of the decision in the case of *Farmers' Exchange Bank v. Hageluken*,¹ above referred to, it has been deemed not unimportant to present what are thought to be the salient and controlling points which that decision contains.

In that case Mrs. Hageluken in the year 1891 acquired the land in question, it being conveyed to her by deed in ordinary form. She was a married woman and afterwards in her own name she executed a deed of trust on this land to secure certain promissory notes for money she had borrowed. Default being made in payment suit was brought against the woman and her husband to foreclose the deed of trust. She resisted this proceeding on the ground that inasmuch as her husband did not join in executing the conveyance, she was incompetent to convey any title by such deed. The circuit court, however, took the opposite view and decreed foreclosure, and from this decree she appealed and the decree was affirmed by the Supreme Court. Such affirmance necessarily decided that a deed made at the time mentioned by a married woman of lands of which she was seized in the ordinary way, passed the legal title to the same and joinder therein of the husband was unnecessary.

In that case, a number of statutes of the State of Missouri and of other states passed under review, as well as decisions of the Supreme Court of Missouri and of other states. Among such statutes was Section 3296, R. S. (Mo.) 1879, as follows:

"(*All real estate*) and any personal property including rights in action, belonging to any woman at her marriage, or which may have come to her during coverture, by gift, bequest or inheritance, or by purchase

with her separate money or means, or be due as the wages of her separate labor, or has grown out of any violation of her personal rights, shall, together with all income increase and profits thereof, be and remain her separate property and under her sole control, and shall not be liable to be taken by any process of law for the debts of her husband. This section shall not affect the title of any husband to any personal property reduced to his possession with the express assent of his wife; *provided*, that said personal property shall not be deemed to have been reduced to possession by the husband by his use, occupancy, care or protection thereof, but the same shall remain her separate property unless by the terms of said assent, in writing, full authority shall have been given by the wife to the husband to sell, encumber or otherwise dispose of the same for his own use and benefit." That section has now become Section 4340 R. S. (Mo.) 1899.

In *Blair v. R. R.*² it was ruled under this section, that the words "her separate property and under her sole control," made her, so far as concerned the personal property and rights in action in that section mentioned, a *feme sole*, since it clothes her with the *jus disponendi* of that property, making her *sui juris* with regard thereto; and this being so, the release by the wife of personal injuries, executed by her alone was valid, and juncture of husband unnecessary. This ruling has frequently met with approval.³

In the case last cited the question arose as to whom the proceeds of a certain tract of land belonged, to the wife or to the husband. And thereupon it was ruled: "The effect of the first deed was to give the wife a title under the married woman's act. The sale of that tract did not give the husband any right to the proceeds of such sale or any interest therein. He had no *jus mariti* in those proceeds by reason of the

operation of that act. Whenever that act operates the rights of the husband at common law in the property of his wife, except to the limited extent preserved by sections 3295 and 3296, Revised Statutes, 1879, forthwith perish."

Subsequent to the ruling in *Blair's* case, several additions were made to Section 3296. Thus, in 1883, (Laws, 1883, p. 113) these words are added at the bottom of that section: "And any such married woman may, in her own name and without joining her husband as a party plaintiff, institute and maintain any action, in any of the courts of this state having jurisdiction, for the recovery of any such personal property, including rights in action, as aforesaid, with the same force and effect as if such married woman was a *feme sole*; provided, any judgment for costs in any such proceedings rendered against any such married woman may be satisfied out of any separate property of such married woman, subject to execution." And in 1889 at the revising session, these words which appear in brackets, supra, were added at the beginning of section 3296, "all real estate and." At the same legislature not only did the legislature make the addition just noted, that of including real estate among the property placed under a married woman's sole control and made her separate property, but it made further advancement in the same liberal direction by enacting an entirely new section 6864, now Section 4335, which reads: "A married woman shall be deemed a *feme sole* so far as to enable her to carry on and transact business on her own account to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and may sue and be sued at law or in equity, with or without her husband being joined as a party; provided, a married woman may invoke all exemption and homestead laws now in force for the protection of personal and real property owned by the head of a family, except in cases where the husband has claimed such exemption and homestead rights for the protection of his own property."

(2) 89 Mo. 383.

(3) *Brown v. Bowen*, 90 Mo. 184; *Broughton v. Brand*, 94 Mo. 169; *Gilliland v. Gilliland*, 96 Mo. 522.

Commenting on the above statutes as well as on Blair's case, it was observed in Hageluken's case:

"If under Section 3296 (As it originally stood, the personal property) and rights in action became a married woman's separate property and under her sole control; and if as to such property she became a *feme sole* and could execute alone a valid release for injuries done her, it is difficult to see why larger and more comprehensive rights did not accrue to, and become hers, by reason of the broad provisions of section 6864, aforesaid. We hold that they did, and that under that section she had full power to contract with, and to deal with strangers, or indeed with anyone else to the full extent of the property rights mentioned in that section, and such contracts when made were followed by such results as attend the contracts of all others. To hold otherwise would be to ignore the plain and broad language of that section, as well as to ignore the evident progress made in our legislation toward the ultimate emancipation of married women from the shackles by which she was fettered at common law, and by the final consummation of that purpose by the enactment of existing statutes."

And it might also have been observed at this point, that the legislature by adding the words "*all real estate*" to section 3296, after the ruling made in the Blair case, of which it is to be presumed they had the knowledge, then and thereby presumptively applied and intended to apply, that ruling to *real* property, as well as to *personal* property, to which latter alone before emanation, that section had theretofore applied, thereby making her as absolute an owner of her real estate as she had previously been pronounced absolute owner of her personal property.

In Hageluken's case, statutes of other states similar to sections 4335 and 4340 were cited and the rulings made thereon.

Thus, in New York, the statute provided: "That a married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and that the earnings therefrom shall

be her sole and separate property." And upon this statute it was ruled that: "The power of a married woman to make contracts relating to her separate business is incident to the power to conduct it. It can not be supposed that the legislature, while conferring the power upon a married woman to enter into trade or business on her own account, intended that her common-law disability to bind herself by contract should continue as to contracts made in carrying on the business in which she was permitted to engage. The power to engage in business would be a barren and useless one disconnected with the right to conduct it in the way and by the means usually employed."⁴

In Illinois, the statute provided: "That such property shall be and remain during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she were sole and unmarried," McAllister, J., remarking: "An estate so derived is no longer the mere creature of equity, dependent upon its power alone for protection, and its principles for the right of enjoyment; but, in all cases, when, by the nature of the gift, bequest, devise, conveyance or deed of settlement, an absolute legal title would be vested in a *feme sole*, the same title would, under the statute, be vested in a *feme covert*, and the property be held, possessed, and enjoyed by her the same as though she were sole and unmarried. When the estate is thus transformed from an equitable to a legal estate, all of the rights incident to it must be legal rights. So far as the statute goes, her disability and her husband's marital rights are alike swept away."⁵

Bishop takes the same position and holds the same theory as to such statutes, saying: "Under the unwritten law, a married woman might hold property in ways which were well defined. If legislation then added to this law a statute, simply providing another way in which she might hold property, the presumption was that since she was still a

(4) *Frecking v. Rolland*, 53 N. Y. 422.

(5) *Cookson v. Toale*, 59 Ill. 515.

wife, the law-making power meant it should be in her hands wife's property. As to it, in the same manner as to everything else, she would remain under the established restraints of coverture. But if the statute went further and provided that the property should be hers in the same manner as though she were unmarried, this further provision would directly negative the presumption, and make the woman a *feme sole* as respects this estate both at law and in equity. Consequently she could sell it, or enter into contracts regarding it, precisely the same as though she were still unmarried. The author can perceive no way in which it is possible for this conclusion to be avoided."

And it was further held in Hageluken's case, that the statute was designed to confer on a married woman the legal estate in her land in as full and complete degree as if she were a *feme sole*, and that being the possessor of the legal title, a married woman's deed must be as broad in its conveying power as that legal title and her capacity to "contract and be contracted with," and would consequently pass that legal title or it would pass nothing. Of course, if the deed to the wife passed to her under the statute a complete legal title as the sole owner of the property, and if under section 4335, she is in all her business transactions to be deemed a *feme sole*, then it inevitably follows, that when she, in such circumstances, conveys her land, "*there is nothing left upon which the husband's tenancy by the courtesy can attach.*"

The views expressed in Hageluken's case, as to the right of a married woman, to sell or convey her real property, held under the Married Woman's Act of Missouri of 1889, as her own separate property, has quite recently been re-enforced and reaffirmed by the ruling made in Kirkpatrick v. Pease,⁶ where specific performance was decreed against a married woman who had ratified a contract made in her name. See also Rice Stix & Co. v. Sally,⁷ where it is held that a statute permitting a married woman "to

contract and be contracted with, sue and be sued," leads to the complete emancipation of the wife from her matrimonial bond, so far as her property rights are concerned in law, as well as in equity. But it must be borne in mind that the ruling in Hageluken's case was based on facts which transpired after the married woman's act of 1889, went into operation. Had she taken title *prior* to the date that act went into force, and then her husband had become tenant by courtesy initiate by reason of seizin of the wife and issue born alive of the marriage, etc., his interest in her property would have ceased to be one in *expectancy*, but would have become a *vested* interest, which could not be done away with by legislation. But if she had taken title prior to the going into operation of the act of 1889, it would have been entirely competent for the legislature prior to issue born alive of the marriage, to have modified, cut off and abolished, all interests or rights in expectancy of that nature.

This is so abundantly established by precedent as scarcely to need the citation of authorities.⁸ And the same rule holds as to modification or abolition of dower.⁹

This view is well illustrated in Leete v. Bank,¹⁰ where the marriage occurred in 1871, and in 1876 and 1877 certain sums of money were paid over to the husband by the executor of the will of his wife's father's estate, with which, her husband bought certain stock, which gave rise to certain litigation by the wife for such stock and which caused discussion of the force and effect of section 3296, enacted March 25th, 1875, the language of which has already been quoted, and it was there held that section was only prospective, and did not operate on existing and vested rights, to-wit: The husband's right to reduce his wife's choses in action into possession, which vested right could not be taken away by retrospective legislation, for such would be unconstitutional, but clearly intimating that

(8) Cooley's Const. Lim. (7th Ed.) 518, et seq. and cas. cit.

(9) 12 Cyc. 1003 et. seq.; 14 Cyc., 884, 885 and cas. cit.

(10) 115 Mo. 184.

(6) 101 S. W. 651.

(7) 176 Mo. 107.

such prospective legislation would be entirely competent if operating only on mere expectancies, which could be entirely abolished by the legislature.

In McBreen v. McBreen¹¹ it was decided that where a husband and wife had made a written agreement upon a sufficient consideration to live apart and absolve each other from all obligations as husband and wife, and she released his estate from all claim for dower; that this agreement rigidly carried on both sides would prevent the husband after her death from obtaining courtesy in her estate. In Treimel v. Kleiboldt¹² it was ruled that where the wife is seized of an equitable separate estate, the limitation of such estate being to her sole and separate use, would not debar the husband of courtesy therein, and the reason given is that "Such limitation necessarily terminates on the death of the wife."

But at that time there was no married woman's act in relation to *real estate* then in force such as we have now, and even had there been, it is not readily seen how the present act could possibly interfere with parties desirous of arranging titles in a particular way. The only object of that act, it would seem, was simply to declare the legal consequences of making a deed to a married woman in common form.

But it is difficult to see why the fact that a deed made to a married woman, giving her an equitable separate estate, in which her husband upon her death would be entitled to courtesy, should have any bearing or effect upon the proper construction to be given to a married woman's act, as to whether under that act a husband would be entitled to courtesy who should survive his wife, where the deed made to her falls within the terms of that enactment. As before stated, if that act creates in a married woman a sole and separate estate in law in her land, of which she is to remain in the sole control, etc., to be deemed a *feme sole* to contract and be contracted with, to sue and be sued, etc., in regard thereto it is not easily understood how she

could possibly have that sole control over that property, or that freedom of a *feme sole* to contract with regard to the same, if there perpetually hung over her land a *contingent curtesy consummate*. It seems quite plain that if this is what the statute means, that it has signally failed in giving to a married woman power to contract and to be contracted with respecting her real property. If she goes out to sell that property, or to raise money on it by mortgage, is it not at once apparent to any practical mind that she could neither sell nor mortgage except at a ruinous sacrifice without her husband should join in releasing his courtesy? And if she has to do this in order to make a clear title, is not her situation relegated to where it was prior to the passage of the Married Woman's Act? If so, what ameliorating influences, what remedial processes, what increased powers and capacities of contracting has that act conferred on married women? Under the theory above stated it would appear difficult to point them out.

The fact that the estate of tenancy by the courtesy is derived from the common law, would not, it would seem, be any more difficult to abolish by legislation than would a woman's dower in similar circumstances, as to which see above cited authorities.

These additional remarks have been evoked by a recent decision of the Supreme Court of Missouri in Meyers v. Hansbrough¹³ where it is held that notwithstanding the provisions of sections 4335 and 4340, a man upon death of his wife, she having borne him children, would be entitled to his courtesy in her land, and the chief reason given for this conclusion seems to be that: "If the husband's estate, by the courtesy exists in land held by the wife as her equitable separate estate in which he has no right to the possession during her life, there is no reason why it should not exist in land held by her under the terms of that statute."

Hageluken's case, *supra*, was not brought to the attention of the court in the case last cited. The court does not, however,

(11) 154 Mo. 823.

(12) 75 Mo. 258.

(13) 100 S. W. 1187.

point out any points of similarity between the two cases above instanced. It is to be regretted that Hageluken's case was not called to the attention of the court, as that was an opinion delivered in banc, in which the learned judge, who delivered the opinion in the case, now under comment, was one of the dissentents.

T. A. SHERWOOD.

Long Beach, Cal.

CONTRACT MARRIAGE—BROKERAGE.

WENNINGER v. MITCHELL.

Kansas City Court of Appeals. Missouri, Nov.
15, 1909.

A contract to aid a woman in securing a husband is invalid, although when the contract was made the woman was endeavoring to marry the man that she subsequently married, and the services that she contracted for were in connection with her efforts to secure such man as her husband; and, although the contract is executed, the woman will not be deemed in pari delicto with the other parties to the contract, and will be allowed to recover the consideration paid.

ELLISON, J.: Plaintiff instituted this action by filing a bill in equity praying for dissolution of a partnership with defendants, and for an accounting. The case was referred to a referee, who took the evidence brought forward by the parties and made his findings for the plaintiff. Exceptions were taken to his report, which the court sustained, and entered a judgment for the defendants.

It appears that plaintiff was a widow and that her name was Skinner; that her husband died in 1905, and that afterwards, in the latter part of the summer or early fall of 1906, she returned to Queen City, Schuyler county, Missouri (the seat of this controversy), where she had formerly lived, and went to board with defendants, who are husband and wife. Defendant D. B. Mitchell was engaged in the livery stable business in that town and shortly after plaintiff came to his house he sold her a half interest in the business and livery stock for \$500 in cash. It seems that plaintiff desired to get married again, and was so anxious in that regard that she advertised for a husband in the newspapers through a matrimonial agency. In this way one Wenninger, of Lincoln, Neb., learned of her, and he, too, wanting to get married, entered into a correspondence with plain-

tiff, which quickly resulted in an engagement and shortly thereafter their marriage. In thus getting a husband plaintiff unwittingly or unwittingly laid the foundation for the defense to this action. Defendants admit that plaintiff purchased a one-half interest in the livery stable for \$500 and became a partner in the business. But they claim that she said to Mrs. Mitchell, before she purchased the interest in the livery stable, that she would pay well if we "would assist her in getting a man;" that after she purchased of them the interest in the stable, "she said if we would help her get this man, she would give us her interest in the barn for our service." Defendants say they carried out their part of the agreement, and that plaintiff's interest in the barn became theirs. We will examine the record to see what substance of law or fact there may be in this claim.

In the first place we find the work claimed to have been performed by defendants for plaintiff to be of such trifling nature as not to deserve serious consideration. It consisted principally in writing two letters. The time covered by this "service" was between the middle of September and the 24th of October, for the first letter was written two or three weeks after plaintiff arrived at their house, which was the latter part of August, and the last one must have been prior to October 24th, as that was the day of the marriage. Thus some time within the space of four or five weeks, Mrs. Mitchell wrote two letters at plaintiff's dictation. The record does not disclose how long a time this took, but the simple matter of writing two letters could not have taken long. Suffice it to say we cannot bring ourselves to believe the task was worth one-half of a livery stable, for which plaintiff had just paid defendants \$500.

But defendants will say that the foregoing was not all the service they performed "in getting a man" for plaintiff. Their further claim came about in this way: It seems that Wenninger, recognizing the custom in such affairs, endeavored to seek plaintiff by going to her and having the wedding at her home. But counsel say the "Fates" interfered, and as he was on his way to the train in Lincoln he met with an accident on a street car, the nature of which is not disclosed. However, he immediately instituted an action for damages against the street railway, and wrote to plaintiff the reason for his failure to appear at her home. It was then arranged by plaintiff that she would go to Lincoln, and the ceremony could be performed notwithstanding the misfortune. Plaintiff invited defendants to the wedding and Mrs. Mitchell straightway accepted, or at least immediately expressed a desire to go, but Mr. Mitchell gave evidence of some

hesitation. He said he was "short of money." At any rate, when he was informed of a matter to be presently mentioned, he too accepted, and all three started for the wedding. It is for thus attending the wedding that the additional service is made up. It is so out of the ordinary for one to charge for an acceptance of an invitation to a wedding that we find difficulty in allowing that it should be done in this instance. The record is silent as to any inconvenience to defendants. It does show that Mrs. Mitchell had never traveled much, and when we reflect on the pleasure it ordinarily must be to be favored with an invitation to a trip from a country village to a distant city to attend a wedding, and, as they said, partake of a "wedding feast," we are again loath to allow any charge in a proceeding in equity. But this is not all to be said on this head, in plaintiff's behalf and defendants' condemnation. Plaintiff paid the expenses of Mrs. Mitchell, and gave Mr. Mitchell a new bedstead. When he learned that plaintiff was to pay his wife's expenses for the trip and give him her new bedstead, his objection softened, and the hesitation noted above faded away. These considerations make it a matter of some wonder how this branch of the defense, so extraordinary in its nature could have been set up. Yet, notwithstanding the foregoing considerations, it must be conceded that the record discloses some evidence of an agreement on plaintiff's part, though she testified that there was not. For the reasons following it will not be necessary for us to say whether she did, in fact, promise to pay for what was not much more than imaginary service.

The defense is based on an unconscionable claim. In *Ball v. Reyburn*, 136 Mo. App. 546, 118 S. W. 524, we approvingly cited this definition of an unconscionable contract from *Chestertield v. Jansen*, 2 Ves. Sr. 155: It is a bargain "such as no man in his senses, and not under a delusion, would make on the one hand, and as no honest and fair man would accept on the other." In passing on the utter disproportion between the service said to have been rendered and the compensation claimed, we will add to what we said at the outset that we must keep in mind the situation of the parties and the possibility, or perhaps the better word would be the impossibility, of defendants rendering any real service. The man they were to aid plaintiff in marrying was not an acquaintance of theirs over whom they had influence; he was a total stranger to them, whom they had never seen or heard of, and who had never seen or heard of them. There is no pretense of any service, nor was there opportunity for any, save the mere writing of two letters, a common civility rarely made a matter for com-

pensation. If plaintiff could have called upon any one running a typewriter, the service could, and doubtless would, have been performed for not more than 10 cents each.

But if we should have concluded that the evidence favored the defendants, it would have been, for another reason, of no benefit to them. It would but show a contract which the law would not aid in enforcing. The contract would be nothing less than that known as "marriage brokerage," which is condemned where the English common law is enforced. The contract, according to the evidence in behalf of the defendants themselves, is one whereby they agreed to aid the plaintiff in bringing about a marriage. They were to procure, or aid in procuring, a husband for the plaintiff. It was subject to all the vicious tendencies such contracts have been shown to possess, and is wholly void. 2 Parsons on Contracts, 73; Lawson on Contracts, Sec. 321; 3 Addison on Contracts, Sec. 1349; *Jangraw v. Perkins* 76 Vt. 127, 56 Atl. 532, 104 Am. St. Rep. 917; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343. The fact that plaintiff was engaged in seeking to marry Weninger when defendants were called in and employed to aid her in the already conceived purpose does not change the nature or character of the contract, nor relieve it of any of the obnoxious features of an ordinary marriage brokerage agreement. Thus in *Jangraw v. Perkins*, supra, the contract was to hasten an intended marriage. It read: "I owe you five hundred dollars and I deed you this land to secure the debt; but if Rivett shall marry your daughter at once and be for six years her faithful husband, the debt shall be satisfied; otherwise, I must pay you five hundred dollars to be held by you in trust for her." It was condemned as illegal. In *Crawford v. Russell*, 62 Barb. (N. Y.) 92, the contract was "that plaintiff should do all she could to aid a marriage between Jeremiah and Christina by her influence and services," for which service and influence Christina promised, if she became the wife of Jeremiah, she would pay plaintiff \$2,000 in cash, and to purchase for her a piano, and also a gold watch for plaintiff's daughter, and pay the expense of the daughter's education. The contract was condemned as illegal. In that case it is shown that the civil law allowed and encouraged marriage brokers and matchmakers for the reason that it was thought to facilitate matrimony. But the common law looked more to bad tendency and the evil consequences flowing from marriages thus brought about. And Judge Story said: "The surprise is not that the doctrine should have been established in a refined, enlightened and Christian country, but that its propriety should ever have been a matter of debate." In *Boynton v. Hubbard*, 7 Mass. 112,

such contracts were pronounced void, "not because they are fraudulent upon either party, but because they are a fraud upon third persons, and because they are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, * * * and they are relieved against for the sake of the public." The idea conveyed by these cases is that to uphold contracts of this nature would make marriage a matter of traffic, and would stimulate marriage procurement in such degree as to be demoralizing in its tendency and unhappy in its result. They are therefore condemned on the ground of public policy.

But it may be said that plaintiff is in *pari delicto*, and therefore cannot take advantage of the illegality, since the law will not aid one who has joined in acts which the law forbids. There are, however, cases where notwithstanding the plaintiff may profit by the relief asked, the public good requires that it be granted; especially is that true when the party seeking relief is the lesser wrongdoer. The question was recently elaborately discussed by Judge Valliant in *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. The judge said that: "The doctrine that courts will not aid a plaintiff who is in *pari delicto* with the defendant is not a rule of universal application. It is based on the principle that to give the plaintiff relief in such case would contravene public morals and impair the good of society. Therefore the rule should not be applied in a case in which to withhold the relief would, to a greater extent, offend public morals. To promote the good of the public is the highest aim of the courts in the application of this doctrine. Under the head of exceptions to the rule in 9 Cyc. p. 550, it is said: "Although the parties are in *pari delicto*, yet the court may interfere and grant relief at the suit of one of them where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff, who is in equal guilt with the defendant. But here the guilt of the parties is not considered as equal to the higher right of the public, and the guilty party to whom the relief is granted is simply the instrument by which the public is served." A question of what is public policy in a given case is as broad as a question of what is fraud in a given case, and is addressed to the good common sense of the court." To the same effect, see *Funding Co. v. Hackett*, 125 Mo. App. 516-539, 102 S. W. 1050. The question was presented to the Court of Appeals in New York in a case of the kind before us. *Duval v. Wellman*, 124 N. Y. 156. The contract was between a woman seeking a husband and the proprietor of a matrimonial journal called the "New York Cupid," and it read as follows:

"June 2, 1887. Due Mrs. Guion, from Mr. Wellman, fifty dollars (\$50.00), Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Guion marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Guion. (Signed) H. B. Wellman, E. Guion." The court ruled that the money paid on the contract could be recovered back, on the ground that the woman was not the equal in guilt with the marriage promoter. And that where the contract was not *malum in se*, the law would afford relief to the more innocent party, and that two parties might "concur" in an illegal act without being deemed in all respects in *pari delicto*.

We, therefore, feel not restrained by the rule in *pari delicto* and, in consequence, do not consider that in any wise stands in the way of plaintiff's right to claim her partnership share of the livery stable property.

The judgment is reversed and the cause remanded, with direction to overrule objections to the referee's report and enter judgment thereon as therein indicated. All concur.

Note—Marriage Brokerage Contracts Invalid Whether Made to Procure or Hasten Marriages.—The policy of the common law in relation to the marriage status is to keep all third persons from any sort of intermeddling therein either by way of anticipation of or during its existence. The latter sort of intermeddling we do not here discuss, except generally to say, that this policy is illustrated in such cases as *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 386; *McCurdy v. Dillon*, 135 Mich. 678, 98 N. W. 746; *Lynde v. Lynde*, 64 N. J. Eq. 736, 58 L. R. A. 471, which held contracts tending to prevent reconciliation between the parties were void, these cases specifically denouncing contracts providing for percentage to be paid attorneys on alimony that might be recovered.

The intervention of third persons is just as rigidly forbidden as to the bringing about marriages. The fact that there is already an existing agreement to marry does not open the door for a contract for services to secure its consummation. The California Supreme Court thus speaks, after announcing the rule as to marriage brokerage: "It is sought to distinguish the present case * * * by the fact that there was an existing agreement for marriage between the parties, and that the agreement with the defendant was only for the purpose of promoting the carrying out of that agreement. * * * * The same reasons by which the rule is upheld control here. The freedom of choice essential to a happy marriage, and the voluntary selection by each spouse of the person who is to be his companion for life are as fully prevented by a person who is employed for mercenary motives, to induce one of the parties to a contract of marriage to carry it into effect, if he has once been disposed to abandon it, as by an endeavor to bring about such an agreement between parties who do not sustain any relation to each other. *Morrison v. Rogers*, 115 Cal. 252, 56 Am. St. Rep. 95.

Similarly this situation was viewed by Iowa

Supreme Court in *Re Estate Grobe*, 127 Iowa, 121.

In *James v. Jellison*, 94 Ind. 292, 48 Am. Rep. 151, a non-negotiable promissory note for \$100.00 was conditioned upon the payee marrying within a certain time and giving to makers the exclusive right to carry "marriage benefit insurance on him and Miss Lizzie Snead, whom he is to marry." The payee married and took out such insurance with the payors exclusively sued upon the note. The court said: "If the condition set forth in the contract relating to said marriage had stood alone, the promise of appellants to pay appellee the sum of \$100 upon his performing said condition might probably have been enforced. See 1 Bish. *Marr.* Women, secs. 786, 787. But this condition was coupled with the additional one, that appellant should have the exclusive right to carry policies of marriage benefit insurance upon the appellee and the lady whom he was engaged to marry. These two conditions were firmly and inseparably united, and jointly constituted the consideration, which was an entire one for the appellant's promise to pay said sum of money." Recovery was denied, and thus this policy of refusing to allow a third person in marriage brokerage to recover is applied to what seems another subject. There does not seem here any case of brokerage at all. The cases generally deal with obligations running the other way and it is in those cases that the rule of non-liability as against public policy is declared. However, as the reason of the rule is to prevent others from bringing about marriage for a pecuniary reward the decision may be right, but it looks like this contract might be declared separable so far as the married party may elect and the third party not be allowed to take advantage of his own wrong.

The rule as to invalidity of these contracts as supporting any action in favor of the third person seems quite universal, and the above cases, except the last, illustrate its spirit. English cases seem fully in accord with American authorities on this subject. See *Roberts v. Roberts*, 3 P. Wms. 66; *Kent v. Allen*, 2 Vern. 188. It is to be remembered that the promotion of a particular marriage which the law condemns is that undertaken by a third person for a consideration enuring to his benefit, that is to say, where he "interfered for a consideration to be received by him between a man and woman for the purpose of promoting a marriage between them." (*Hellen v. Anderson*, 83 Ill. App. 506), and not where the inducement to marriage is of the nature or kind of a marriage settlement. Thus, where a father promised his future daughter-in-law that he would give her a home for a certain period if his son failed to provide for her, this contract was held valid as having no "tendency to disturb the harmony of conjugal life." *Wright v. Wright*, 114 Iowa, 748, 55 L. R. A. 201, and cases cited in note.

But the Vermont Supreme Court decided that where one was indebted to a father in the sum of \$500 and executed a mortgage therefor with a condition that it should be void if mortgagor, who was about to marry his daughter, should do so immediately, and would for six years support her to the best of his ability, otherwise to pay the mortgage debt, this was a marriage brokerage contract condemned by law and public policy. The marriage took place, but the agreement as to support was not complied with and foreclosure

was denied. This case cites authorities where the consideration went to a third party though the contract does not seem to come within the definition of marriage brokerage above given. C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Charity—Fund Subscribed for a Particular Purpose—Application of Surplus to Similar Purposes by the Trustees.—A fund was subscribed for the relief of the widows and orphans of six fishermen who were drowned. The fund was vested in trustees who proposed to treat part of it as a permanent fund for the relief of similar cases of distress. Held, that until a surplus was proved to exist the trustees were not entitled to apply any part of the fund in the proposed manner. *Cross v. Lloyd Greame*, Ch. D. December, 1909.

On the 5th of February, 1909, two fishing boats known as *The Gleaner* and *The Two Brothers* were wrecked in a gale off Flamborough Head, and the crews, consisting of six men, were drowned. On the following day the Mayor of Bridlington issued an appeal for contributions for the relief of the widows and orphans of the six fishermen who had lost their lives. In answer to the appeal a sum of £2,200 was subscribed and paid over to the defendants as trustees who proposed to treat the same as a fund not only for the relief of the widows and orphans of the six fishermen, but also for the relief of the widows and orphans of other persons who in years to come might have the misfortune to be drowned near Flamborough Head. This action is brought by the widow of one of the fishermen as *cestui que trust* against the defendants as trustees of the fund subscribed.

The court said: "The plaintiff contends that the fund was subscribed for a particular purpose or charity and that the proposed application of it is in effect a breach of trust, and she claims to have it properly administered. The response to the appeal for subscriptions was more generous than was anticipated, and a committee was appointed with a view to determining how the fund should be dealt with. Counsel for the defendants emphasize the fact that the committee are specially qualified to deal with the fund. But what was vested in the defendants was a fund subscribed for a particular purpose and the committee have no power or authority to apply it for any purpose other than that for which it was subscribed. It is fallacy to suppose that because the subscribers, who could not administer the fund themselves, vested the fund in a committee therefore the subscribers vested in the committee other powers of dealing with it."

Criminal Law—Obstruction of Police—Right to Petition Prime Minister.—While every subject of the King of England has a right to petition the prime minister, it is not the duty of the prime minister to receive every such petition nor those who bear it, and the attempt to force an audience is a breach of the peace.—*Pankhurst v. Jarvis*, K. B. (Dec., 1909).

A deputation of suffragettes led by Lady Pankhurst came to St. Stephen's Entrance to Parliament for the purpose of presenting a petition to the prime minister, who sent out a note to the effect that it was not his wish to

receive them nor their petition. The delegation insisted upon what they called their right of petition and sought to force their way by the police. Having by their actions drawn a curious crowd which was obstructing traffic, the police arrested the ladies for a breach of the peace and resisting and obstructing the police. They were convicted.

On appeal, Alverstone, L. C. J., said: "Although there is an undoubted right in every subject of the King to present petitions to members of Parliament, there was no duty on a member of Parliament to receive such a petition nor was there any right in any subject to demand and receive a personal interview with a member of Parliament, whether a Minister of the Crown or not, for the purpose of placing before him any views on political matters, and that therefore when the appellants received the letter they were not entitled when the police told them to go away to be and remain where they were, that is on the public pavement near the entrance, and that by refusing to go away and by behaving as hereinbefore mentioned they were obstructing the police in the execution of their legal duty."

Divorce—Adulterous Petitioner.—The court will not exercise its discretion in favor of a petitioner who has himself committed adultery, notwithstanding the fact that his wife may have condoned the offense. Wain v. Wain, Prob. D. (Dec. 6, 1909).

Wain filed a petition for divorce on the 25th of September, 1908, alleging adultery of his wife with the co-respondent Eves. A decree nisi was pronounced on the 11th of January last, the suit being undefended. The King's Proctor's plea alleged that certain material facts had not been brought to the knowledge of the court, and that the petitioner had himself been guilty of adultery. In his answer the petitioner denied certain acts of adultery, and pleaded that prior to the 27th of June, 1902, both he and the respondent had been guilty of adultery, but had agreed to forgive and condone the same, and had resumed cohabitation on that date. The parties, it appeared, went to Colorado in 1891, Wain returning in March and his wife in October of that year. The petitioner and respondent lived apart, the former going to reside in the same house as a Mrs. Morley for eighteen months from 1892. In 1895 he returned and lived with Mrs. Morley till her death in November, 1901. In 1902, the respondent, who had lived with another man not Eves, resumed cohabitation with the petitioner. The respondent, in answer to the court, alleged that want of means prevented her defending the petitioner's suit. Counsel for the petitioner submitted that if the petitioner's cohabitation with Mrs. Morley had been disclosed to the court it would not amount to a "material fact" within Hunter v. Hunter (53 W. R. 666; 1905, P. 217), having regard to the subsequent condonation of his conduct by the respondent.

Bargrave, Deane J.: In the case of Anichini v. Anichini (2 Curt. 210) the court said: "Though difficult and dangerous to attempt to lay down any general rule, the court could not go the length of saying that the adultery of the husband, followed by condonation, would debar him from a remedy against his wife under any circumstances which could be supposed." In Clarke v. Clarke (13 W. R. 848, 34 L. J. P. & M. 94) it was said that "a case, however, might arise where a husband many years before his wife's adultery might have fallen a victim to

some sudden impulse, and have committed an act of adultery which was followed by long cohabitation with his wife, and in such a case the court might hold that he was entitled to relief, notwithstanding his adultery." But in the Clarke case only one act of adultery was referred to, but in the present case the petitioner, Wain, had lived with Mrs. Morley for several years. The wife had condoned that adultery, and that made a difference as between the parties, but not when they were before the court. The condonation did not affect his (the learned judge's mind). It was advantageous to the public that adultery of the kind committed by the petitioner should debar him from relief. The decree nisi would be rescinded, the petition dismissed.

Factory—What Constitutes as to Employment of Minors.—The respondent was summoned for employing persons under sixteen years of age in a factory without obtaining certificates of their fitness as required by sec. 68 of the Factory and Workshop Act, 1901. The respondent was the occupier of the premises, and his business consisted in purchasing rags, which were sorted by hand, having been in some cases dusted by a shaker driven by an electric motor, and were sold wholesale to manufacturers of paper. Held, that as this did not constitute a manufacturing process, the premises were not a factory within the meaning of sec. 149 of the Factory and Workshop Act, 1901. Patterson v. Hunt, K. B. 13. (Oct., 1909).

Alverstone, L. C. J.: "I think that the only operation really carried on was the sorting of rags, and that the sorting of articles so that they may be sold in different parcels ought not upon such facts as these to be brought within the words 'manufacturing process' or 'adapting an article for sale.' There is considerable force in the argument that the article remains the same although it is sorted from another article of the same class, and I think that the argument that one should look at the bulk as a collection of articles which in bulk cannot be sold so advantageously, and that, therefore, separating them so that they can be sold is adapting them for sale, ought not to prevail. As I take the view that the sorting of these articles is not a manufacturing process and is not an adapting of them for sale, but only a sorting of articles for sale, I am not able to come to the conclusion that the magistrate was wrong in holding defendant's premises not a factory."

Landlord and Tenant—Suit for Forfeiture for Breach of Repair—Effect on Sub-Lessee.—The effect of the order giving relief against forfeiture for a breach of covenant to repair is to continue the original lease for all purposes, so that an under-lessee continues liable on the covenants in his derivative lease notwithstanding the issue of the writ to recover possession by the superior landlord. Dendy v. Evans, Ct. of Appeal, (Dec. 8, 1909).

Libel—Evidence Given That Article was not Intended to Refer to Any Living Person.—In an action for libel the question, if it be disputed, whether the alleged defamatory statement is intended to refer to the plaintiff is one of fact for the jury. Jones v. Hulton & Co., House of Lords (Dec. 3, 1909).

The alleged libel was contained in an article written by the defendants' Paris correspondent, which purported to be descriptive of life in Dieppe at the Motor-Car Races. Incidental reference was made to the passing through the scene of "Artemus Jones with a woman who

was not his wife, and who must be the other thing;" and a contrast was drawn between this person under such circumstances and as a churchwarden at Peckham. Mr. Artemus Jones, a barrister-at-law (who did not live at Peckham and was not a churchwarden), was the plaintiff, and he alleged that the article was, in the estimation of his friends, a libel upon him. The defendants pleaded at the trial that the article was not intended to refer to any living person, and published a disclaimer to that effect.

Lord Loreburn: A libel is a tortious act. What does the tort consist of? In using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complained of being injured by it. A person could not defend himself—from a charge of libel—by saying that he intended, in his own mind, not to defame the person complaining of being injured by the libel. By publishing the libel, he had imputed something disgraceful of the plaintiff, who had none the less cause to complain because the defendant said that he did it unintentionally. A man in good faith might publish a libel believing it to be true; it might even be found by a jury that he acted in good faith believing it to be true, and that at the time he made the statement he had a reasonable ground for believing it to be true, but that, in fact, the statement was false. In such circumstances he could not successfully defend the action. It was suggested that there was a misdirection by the learned judge. I can see no error. The learned judge, in summing up, had laid down the law as follows: "The real point on which your verdict must turn is: Ought or ought not sensible and reasonable people reading this article to think that it was some imaginary person, such as I have said—Tom Jones, Mr. Pecksniff, Mr. Stiggins, or anything of that sort of names that one reads in literature used as types. If you think that any reasonable person would think that, it is not actionable at all. If, on the other hand, you do not think that, but think that people would suppose it to mean some real person—those who did not know the plaintiff, of course, would not know who the real person was, but those who did know of the existence of the plaintiff would think that it was the plaintiff—then the action is maintainable, and subject to such damages as you think, in the circumstances, are fair and right to give the plaintiff." His lordship saw no misdirection in that passage.

Mines—Fatal Accident Caused by Explosion Due to Alleged Breach of Statutory Rules—Burden of Proof.—The plaintiff sued to recover damages for the death of her husband, alleging that the explosion in the mine was caused by a shot fired contrary to the statutory rules, there being coal dust in that part of the mine. The defendants said that the explosion was due to gas percolating into the gallery from disused workings. Under constructions that the burden of proof was on the plaintiffs, the verdict was for the defendants. The Court of Appeal ordered a new trial (Fletcher Moulton and Buckley, L.J.J., Cozens-Hardy, M.R., dissenting), on the ground that section 49 of the Coal Mines Regulation Act, 1887, imposed a statutory duty on the mine-owner personally to see that the workmen in the mine did not act contrary to the rules; and section 50 rendered the mine-owner civilly liable if from non-compliance with any of those rules a workman was injured, un-

less the mine-owner could prove that he had taken all reasonable means to enforce the rules and prevent such contravention or non-compliance by the workmen.

Their lordships on appeal held that the onus of proof rested on the mine-owners. On that ground the appeal was dismissed and the order of the Court of Appeal directing a new trial was affirmed. *Britannic Merthyr Coal Co. v. David, House of Lords*, (Dec. 13, 1909).

ENGLISH NOTES.

In the King's Bench Division, recently during the hearing of a case which was not of general interest, when counsel was opening the defendant's case, Ridley, J., intimated that, in his opinion, counsel was doing so at too great length, and after some further discussion the learned judge expressed his intention of rising at once if counsel did not immediately proceed to call his evidence, and said that the whole question of delay in the courts had been recently considered by a committee, and in his opinion a great deal of it was caused by the length of counsel's speeches, which were now much longer than when he was at the Bar. Counsel, after protesting, proceeded to call his evidence, and the case terminated without further incident.

One grave defect in the administration of the criminal law has not been remedied, says a writer in the *Globe*, though several of Mr. Asquith's colleagues condemned it strongly before they took office. We refer to the long detention of accused persons before trial at the Assizes. Of this evil—for which the long and irregular intervals between the Assizes are responsible—two striking instances have occurred within the past few days. A man was tried at Leeds for murdering his wife on the 18th of July, and a woman was tried at Guildford for murdering her illegitimate child on the 22nd of July, and both these prisoners, after having a charge of murder hanging over their heads for four months, were found to be innocent. "It frequently happens," Lord Loreburn, then Sir R. T. Reid, once remarked in the House of Commons, "that a person who has been kept in prison for two, three, or even four months is found not guilty. It is perfectly shocking that such a state of things should exist." The shocking state of things has, unfortunately, not been removed.

JETSAM AND FLOTSAM.

DELAYS IN ADMINISTRATIVE JUSTICE IN ENGLAND.

England is troubled with judicial delays even as we are here in America, with this difference, that when the condition began to be intolerable, to-wit, a delay of five and six months on appeals from county courts to the King's Bench division, there arose a great clamor, and Parliament appointed a commission to examine into the causes of the congestion of the docket of the King's Bench Division. This commission has just made its report and recommendations to Parliament and makes very interesting reading. The Justice of the Peace (London), in speak-

ing of this report, said: "Now that the joint select committee appointed by the two Houses of Parliament to consider the position of business in the King's Bench Division have presented their unanimous report, it is to be hoped that there will be no further delay in dealing with a state of affairs which can hardly be described as anything less than a public scandal. The committee say that they are satisfied that there is, at the present time, a serious congestion of business in the King's Bench Division of the High Court. They are of opinion that this state of things cannot satisfactorily be dealt with by the appointment of commissioners, and they recommend the addition, at once, of two judges to the King's Bench Division. They also earnestly recommend that in the meantime, and without delay, certain reforms which have been suggested to them for the better organization of business in London and on circuit should be considered with a view to such of them as are found practicable and desirable being carried into effect. At the same time they do not mean that the proposed addition to the judicial establishment should necessarily be a permanent one. That point could be decided by Parliament after further experience, and, in the first instance, additional appointments might be made upon the footing that the next two vacancies subsequently occurring should remain unfilled unless Parliament expressly sanctioned another appointment.

In 1907 the Lord Chancellor, speaking in the House of Lords, made the following remarks: "Our ideal should be, as far as we can, to see that there are no arrears in any courts. It is a high ideal, but one at which we should aim; and I believe that in substance, with an adequate number of judges, it might be attained in many instances," and, if we remember correctly, he expressed on the same or another occasion the hope that the time might come when an action might be set down for trial on one day and be heard on the next. Now, whatever was the state of affairs in 1907 when Lord Coleridge was added to the Bench, it had undoubtedly grown still worse in the spring of the present year when a formal demand for a further increase of the establishment was put forward at the annual meeting of the bar.

Since 1907 the figures have grown worse instead of better, and the Lord Chief Justice was amply justified in stating recently to the new Lord Mayor of London, that "it is a fact that to-day, should anyone desire to have his cause tried, there must be a delay of five or six months, and any appeal from a county court judgment cannot be heard without a delay of four or five months." Indeed, he was understanding the facts, for we find that in the last week of October a divisional court were hearing appeals from decisions given in county courts in the middle of March. If any further evidence had been needed upon the point it was available early in the summer in the form of the report of Lord Gorell's Committee on County Court Procedure: "It has become more definitely apparent, and will become more so, that the number of King's Bench judges is insufficient for the work which they are now called upon to attempt to do if they are to remain unassisted. They are always working at the highest pressure and yet there are always arrears." It cannot be doubted that, as the Lord Chancellor said, in 1907, "in many instances the delay of justice is a denial of justice," and it is to be earnestly hoped that the influences which, to all appearances, must have

been working in favor of delay will now be disregarded.

There is one recommendation in the committee's report which will, we believe, meet with particular approval, and that is their condemnation of the suggestion, believed to find favor in some quarters, that the difficulty should be met by the appointment of commissioners in relief of judges on circuit. The argument against this plan is not that persons called upon to act as commissioners have not generally been fully competent to perform the work and worthy of a place on the bench had a vacancy arisen. The question is, as has so often been pointed out in other connections, not whether justice has in fact been done, but whether the ordinary individual and the parties concerned can reasonably have any doubt upon the point. To our mind there is something entirely wrong with a system which allows a man to appear as judge one day and in the same court as advocate the next. Upon an emergency the appointment of a commissioner may be a necessary expedient, but, in our opinion, it ought to be adopted with the greatest reluctance and recourse had to it only to meet some unforeseen emergency.

CORRESPONDENCE.

DOES THE COMMON LAW PROHIBIT A MONOPOLY BY PURCHASE?

Editor Central Law Journal:

From the article which you publish in 69 Cent. L. J. 238, I quote the following from page 244:

"The common law was undoubtedly opposed to monopoly. In *Rex v. Waddington* (1 East 143), a man was convicted under the common law for buying up all the hops in the neighborhood of a village and thereby creating a monopoly in hops. Now, of course, this man did not buy up every pound of hops. Necessarily, there were some hops that escaped him, but he had secured practically all of them. The common law meant therefore that no man should appropriate all of a thing."

Further on the writer of the article comments on the Sherman law, and criticises the conclusion of the Supreme Court that when a combination of corporations tends to create a monopoly it comes within the provisions of that law. He then goes on to say:

"If the proposition as announced by the court is to be adhered to, will not this follow? There are six men engaged in the interstate leather business. One of them becomes so rich that he buys out the other five. He has ended the competition that originally existed between the six, and he has established a business that tends to create a monopoly. Will not the doctrine allow congress to provide that this man's business shall be broken up and destroyed?" 69 Cent. L. J. 245.

The writer of the article believes that it is beyond the constitutional powers of congress to penalize a business merely because it tends to create a monopoly, but that it may be penalized when it actually creates a practical monopoly. He seems also to think that a state has power to penalize a business within its territory when it creates a practical monopoly, or rather that such a business is already penal by virtue of the common law.

It is the last proposition to which I desire to

direct particular attention. Would it be a penal offense for a man engaged in the hop business to buy up all the hops, not merely in the neighborhood of a village, but within the confines of the nation? Does the common law as it now exists, place any restrictions upon the citizen's right of acquisition by purchase so far as mere quantity of the thing purchased is concerned. Suppose a citizen of the United States should buy practically the whole of some commodity in common use, would his property in that commodity cease to be within the protection of the fourteenth amendment to the constitution?

Many who take a different view from that of the writer of the article in question will feel disposed to criticise what he offers as "An entirely new and original theory for dealing with the trusts," but it would not be practicable to attempt such criticism in a letter to the editor.

Yours very truly,

W. A. COUTTS.

Sault Ste. Marie, Ont.
Dec. 19, 1909.

BOOK REVIEWS.

NICHOLS ON THE POWER OF EMINENT DOMAIN.

This book, in one volume, appears to us to promise to be one of the standard works in legal literature. Its scope, as stated by the author's preface, to be "a treatise on that branch of constitutional law which relates to the taking of private property for the public use," seems, at first blush, to be in a narrow field, but, considering that the powers of sovereign states are limited in such varying ways by their constitutions, and the exercise of the right of eminent domain has been invoked under so many new conditions and for so many new purposes, makes it highly important, that general principles in limitation should be well understood. The distinction between eminent domain and such powers as taxation, special assessments, requiring personal services, destruction from necessity and the police power are all well treated, and the work progresses in logical sequence with clear and precise statements, to a very full treatise within the scope attempted. Questions like taking, imposing servitudes, damaging, are all considered, as well as what constitutes public use. Procedure is not treated, except very incidentally. All questions directly within the main purpose of the work are meant to have exhaustive citations therewith.

This book is bound in law buckram, contains 560 pages and is published by Boston Book Co., Boston, Mass. 1909.

BOOKS RECEIVED.

A Manual of Medical Jurisprudence for the Use of Students at Law and of Medicine. By Marshall D. Ewell, M. D., LL. D., late President and Dean of the Kent College of Law, Chicago; Lecturer on Medical Jurisprudence at the University of Michigan, etc., etc. Second Edition. Boston: Little, Brown and Company, 1909. Price, \$2.50. Review will follow.

HUMOR OF THE LAW.

Two rich neighbors in Indiana, once got into litigation over a hog worth probably \$5, and they lawed, and they lawed, until the bill of costs ran up over \$800. Hon. Benjamin F. Love, of Shelbyville, now deceased, was one of the attorneys for the plaintiff. After the case had been tried before a justice of the peace, and then appealed to the Johnson circuit and tried, a change of venue was granted, and it was sent to the Shelby Circuit Court for a third trial. Here Mr. Love first got into the case. In this trial plaintiff put in all his evidence, and everything was going smoothly, when defendant, for the first time in the history of the case, began to develop the defense that there were actually two hogs very much resembling each other, and that plaintiff's witnesses were struggling with a case of "mistaken identity." The attorneys for the plaintiff were "caught napping," so to speak, but Mr. Love arose and said to the court with great dignity: "Your honor, I object to the introduction of any testimony pertaining to this nunc pro tunc hog!" This bon mot is said to have produced such a good feeling among all parties that it led to a compromise of the case.—Ohio Law Bulletin.

A letterhead of an ambitious Texas lawyer which has been sent us several times by some of his brethren in that state is, with the omission of names, as follows:

Office of

—The Lawyer—The Real Estate Man
Hon. _____, L.L.B., U. of T. '03.

Practice in all Courts.

No trouble to answer legal questions
regarding Texas laws.

Motto:—"Action, Not Air."

Not a collecting agency except under special contract.

Licensed Conveyancer of Real Estate.
_____, Texas.

One of our correspondents, who sends it, states that he is reminded of the reply of a colored man coming away from a political speech. When asked who was speaking, he said: "Jedge, I don' know who he air. But he is shore giving hisself a powful good riccomend."—Case and Comment.

WANTED TO SEE THE LIVING PICTURES.

A lawyer, moving to a new territory, who possessed, besides his qualifications as a lawyer, considerable ability as an elocutionist, desiring to make himself acquainted with the public as well as to increase his bank account during the time of waiting for a practice to develop, made an itinerary of the country as an elocutionist. His advertising matter was generously scattered about, and, among other things, his handbills announced "Living Pictures of Wit and Oratory from the Greatest Masters," the words "living pictures" being displayed in bold type and the other words in smaller letters. After his address at one place, and immediately upon its close, a number of rough frontiersmen of the cowboy type accosted him and demanded where "them living pictures" were. He endeavored to explain that the words "living pictures" in his advertisement were used metaphorically, but he was unable to satisfy the audience, and they insisted that, if he could not show the living pictures, he must refund the price of admission, which he was finally obliged to do.—Case and Comment

WEEKLY DIGEST.

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1. Adverse Possession—Occupation Under Tax Deed.—Actual or constructive possession of land under a tax deed held necessary to bar recovery by the former owners by limitation.—*Kathan v. Comstock*, Wis., 122 N. W. 1044.

2.—Relation of Parties.—Adverse possession by a grantee for security held not to exist until conveyance to third person.—*Mahaffy v. Faris*, Iowa, 122 N. W. 934.

3. Aliens—Chinese.—Where, in Chinese deportation proceedings, accused presented a judgment of discharge in former proceedings, the burden was on him to establish his identity with the person named and described in such judgment.—*Ex parte Long Lock*, U. S. D. C., N. D. N. Y., 173 Fed. 208.

4. Alteration of Instruments—Change by Stranger.—Change in a written contract by a stranger thereto held not alteration, but a spoliation, not avoiding it.—*Spreng v. Juni*, Minn., 122 N. W. 1015.

5. Appeal and Error—Remoteness of Evidence.—Ordinarily the question of remoteness of evidence is for the trial court, and not reviewable, but a ruling on the question made expressly as a matter of law is reviewable.—*Belka v. Allen*, Vt., 74 Atl. 91.

6. Attachment—Attorney's Fees.—In actions on attachment bonds, attorney's fees need not be reasonable in reference to the actual damages sustained, but may be referred to the exemplary damages in addition.—*International Harvester Co. of America v. Iowa Hardware Co.*, Iowa, 122 N. W. 951.

7. Attorney and Client—Disbarment.—The

fact that an attorney's credit at a bank, where he deposited money collected for his client, became greatly damaged by the depreciation of certain securities which he had deposited as collateral, is immaterial in proceedings for his disbarment for having appropriated the money and failed to pay it over promptly as he should have done.—*People v. Pattison*, Ill., 89 N. E. 254.

8. Auctions and Auctioneers—Right to Modify Terms of Sale.—Formal written terms of public sale distributed prior to the sale may be modified or added to by the auctioneer at the beginning of sale.—*Kendall v. Boyer*, Iowa, 122 N. W. 941.

9. Bail—Remission.—The sureties on a criminal recognizance held entitled to a remission of a part of the penalty for which judgment was taken against them on its breach where the defendant was afterward rearrested, convicted, and served his sentence.—*United States v. Travnor*, U. S. D. C., E. D. Tenn., 173 Fed. 114.

10. Bankruptcy—Attachment, When Maintainable.—A court of bankruptcy may properly remit an attachment creditor, where the bankrupt had given a bond, to prosecute his action to judgment against the bankrupt for the purpose of perfecting his right of action against the surety, where the estate is protected from loss.—*In re Maaget*, U. S. D. C., S. D. N. Y., 173 Fed. 232.

11.—Dower, Waiver Of.—A bankrupt's wife having agreed to relinquish her dower in her husband's land for a specified price, the court was authorized to decree a sale of the land free from dower.—*In re Acretelli*, U. S. D. C., S. D. N. Y., 173 Fed. 121.

12.—Exemptions, Delivery Of.—It is the duty of a trustee in bankruptcy, who has set off to the bankrupt personal property selected by him as exempt, pursuant to an order of the referee, and reported the same, to which report no exception was taken, to deliver possession of such property to the bankrupt.—*In re Soper*, U. S. D. C., D. Neb., 173 Fed. 116.

13.—Liens.—The bankruptcy act does not invalidate liens on funds due municipal contractors for the construction of public buildings created by Act March 30, 1892.—*National Fire Proofing Co. v. Daly*, N. J., 74 Atl. 152.

14.—Liens.—A valid lien upon a fund having been acquired more than four months before bankruptcy proceedings, enforcement thereof within that time is not an illegal preference under the bankrupt act.—*Wood v. Kerkeslager*, Pa., 74 Atl. 174.

15.—Priorities.—The federal bankruptcy act did not prevent enforcement in federal bankruptcy proceedings of general priorities, recognized and conferred by state laws as substantive rights, when not in conflict with the federal act.—*In re Standard Oak Veneer Co.*, U. S. D. C., E. D. Tenn., 173 Fed. 103.

16.—Referee, Finding of.—The finding of a referee in bankruptcy on an issue of fact is entitled to great weight, and should not be set aside unless clearly erroneous.—*In re Hoffman*, U. S. D. C., E. D. Wis., 173 Fed. 234.

17.—Trustee, Right of to Avoid Mortgage.—Under Bankr. Act, c. 541, §§ 67a, 70e, a recital in a chattel mortgage given by a bankrupt as to his place of residence does not estop his trustee to show that his residence was in fact in another place, where the mortgage was not recorded, and which fact rendered it void as

against general creditors by the law of the state.—*In re McDonald*, U. S. D. C., D. Mass., 173 Fed. 99.

18. **Benefit Societies**—Forfeiture of Certificate.—A fraternal order held estopped from insisting on a forfeiture of a certificate because the beneficiary therein had obtained a divorce from the member.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle*, Tenn., 122 S. W. 981.

19.—Forfeiture of Insurance.—Insured held not convicted of a felony within a certificate of life insurance, conditioned to be void on his being so convicted, where, after verdict, judgment, and sentence, he appealed, with suspension of sentence and judgment under Rev. St. 1899, § 2698 (Ann. St. 1906, p. 1590), and pending appeal he died.—*Baker v. Modern Woodmen of America*, Mo., 121 S. W. 794.

20. **Bills and Notes**—Accommodation.—Defendant held not liable to the receiver of a bank on an accommodation note issued for its benefit.—*Lyons v. Westwater*, U. S. C. C., W. D. Pa., 173 Fed. 111.

21.—**Bona Fides**.—A finding of purchase of a note without notice held not equivalent to one that he acted in good faith.—*Pierson v. Huntington*, Vt., 74 Atl. 88.

22.—Burden of Proving Credits.—In an action on notes, the burden was upon defendant to prove certain credits claimed by him.—*Forsythe v. Lexington Banking & Trust Co.*, Ky., 121 S. W. 962.

23.—Counsel Fees.—An agreement in a note to pay counsel fees if collected by an attorney renders it non-negotiable.—*American Machinery & Export Co. v. Druge Bros.*, Vt., 74 Atl. 84.

24.—Indorsement.—That notes sued on bore indorsement of plaintiff held not to affect his right to sue.—*Bynum v. Hobbs*, Tex., 121 S. W. 900.

25.—Right to Sue.—The owner of a note, in which a third person is named as payee, may sue thereon, without endorsement, upon proof of ownership.—*Spreng v. Juni*, Minn., 122 N. W. 1015.

26. **Boundaries—Land Under Water**.—The owner of a bank of a navigable stream owns to the center of the stream, unless the ownership of the bank and the bed of the stream has been separated, subject only to governmental and public rights, and the bed of a navigable stream is land.—*Green Bay & Mississippi Canal Co. v. Telulah Paper Co.*, Wis., 122 N. W. 1002.

27. **Building Contracts**—Destruction by Fire.—Where the painting, which was included in a contract to build a house, was not finished when said house was destroyed by fire, the contract was not completed, so as to render the owner liable on the contract.—*Annis v. Saugy*, R. I., 74 Atl. 81.

28. **Cancellation of Instruments**—Sufficiency of Evidence.—The presumptions of validity attaching to a written instrument, where signed in the presence of witnesses and acknowledged, held to require convincing evidence to set it aside for fraud.—*Bingaman v. Bingaman*, Neb., 122 N. W. 981.

29.—**Undue Influence**.—A deed obtained by undue influence will be set aside unconditionally, if there was no consideration, and will be permitted to stand only as security for payments made if the consideration was inadequate.—*Bellamy v. Andrews*, N. C., 65 S. E. 963.

30. **Carriers of Goods**—Bill of Lading.—A bill

of lading valuing goods at \$5 a hundred pounds, and limiting recovery to that amount, held not to require that \$5 a hundred pounds be taken as the actual value of the goods and the injury estimated by reference to a percentage of that value.—*Huguelet v. Warfield*, S. C., 65 S. E. 985.

31.—**Bill of Lading**.—Bill of lading or pre-payment of freight held unnecessary in the absence of law or notice to the shipper that it is required by the carrier's rules.—*Lord v. Maine Cent. R. Co.*, Me., 74 Atl. 117.

32.—**Loss of Freight**.—Where the initial carrier received goods for transportation to another state by a connecting carrier, in absence of contrary evidence, it is presumed that the goods were lost through the negligence of the last carrier.—*Kansas City Southern Ry. Co. v. Carl Ark.*, 121 S. W. 932.

33.—**Rebates**.—A coal shipper, which, with others, was given rebates by a railroad company in violation of law, cannot maintain an action against the company to recover damages for discrimination, because others were granted larger rebates.—*Pennsylvania R. Co. v. International Coal Mining Co.*, U. S. C. C. of App., Third Circuit, 173 Fed. 1.

34. **Carriers of Passengers**—Injury to Alighting Passenger.—A person alighting from a street car moving at the rate of six miles an hour held negligent.—*Fosnes v. Duluth St. Ry. Co.*, Wis., 122 N. W. 1054.

35. **Certiorari**—Purpose.—Certiorari lies only to correct jurisdictional errors.—*State v. Willcuts*, Wis., 122 N. W. 1048.

36. **Conspiracy**—Confession.—Declarations of an alleged co-conspirator to a witness are inadmissible to prove the existence of the conspiracy as against another party thereto.—*Hauger v. United States*, U. S. C. C. of App., Fourth Circuit, 173 Fed. 54.

37.—**Overt Act**.—Where defendants conspired to obtain reservation lands unlawfully, their agreement with another that he would make a false application, and his making an accompanying false oath, held a sufficient overt act.—*United States v. Raley*, U. S. D. C. D. Oregon, 173 Fed. 159.

38. **Constitutional Law**—Due Process.—A judgment rendered by a state judge does not deprive the defeated party of his property without due process of law, in violation of 14th amendment to the federal constitution merely because the judge was the father-in-law of the attorney of the successful party, who was entitled to receive a part of the judgment for his fees.—*Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, Tex., 122 S. W. 871.

39.—**Impairment of Contracts**.—A contract binding a public service corporation to render certain services, valid when made, held within the constitutional protection prohibiting the impairment of obligations of contract.—*City of Superior v. Douglas County Telephone Co.*, Wis., 122 N. W. 1023.

40.—**Presumption of Validity**.—The presumption in favor of the constitutionality of a statute is so binding that the public and individuals are bound to treat it as valid.—*State v. Poulin*, Me., 74 Atl. 119.

41.—**Special Acts**.—The constitution permits special legislation when general laws cannot be made applicable, and the legislature is the sole judge of the necessity for a special statute.—*Missouri & N. A. R. Co. v. State*, Ark., 121 S. W. 930.

42. **Contracts—Consideration.**—A written agreement is *prima facie* proof of a valid consideration.—*Brown v. Edsall*, S. D., 122 N. W. 658.

43.—**Demand of Payment.**—A party, refusing to make a payment under a contract on a specified ground, held to thereby waive all other grounds known to him at the time.—*Schillinger Bros. & Co. v. Bosch-Ryan Grain Co.*, Iowa, 122 N. W. 961.

44.—**Duration.**—A contract held not terminable at will merely because the duration thereof is uncertain.—*City of Superior v. Douglas County Telephone Co.*, Wis., 122 N. W. 1023.

45.—**Duress.**—Contracts of a parent for the payment of a debt of a son, executed under circumstances created by the creditor which deprive the parent of the freedom and power of deliberation necessary, may be avoided in equity as made without consent.—*Ball v. Ward*, N. J., 74 Atl. 158.

46.—**Fraud.**—The doctrine that a party is conclusively presumed to know the contents of an instrument signed by him does not obtain as against fraud.—*Vallancourt v. Grand Trunk Ry. Co. of Canada*, Vt., 74 Atl. 99.

47.—**Gambling in Stocks.**—Transactions in stocks, if criminal in their nature, could not be ratified.—*Pelouze v. Slaughter*, Ill., 89 N. E. 259.

48.—**Misrepresentation.**—Misrepresentation of a material fact causing another to enter into a contract to his prejudice held to avoid the contract, although the misrepresentation was made in good faith.—*Kathan v. Comstock*, Wis., 122 N. W. 1044.

49.—**Performance.**—One suing on a contract must, to recover, show a substantial compliance with its terms, or a waiver of such compliance on the part of the adverse party.—*Schillinger Bros. & Co. v. Bosch-Ryan Grain Co.*, Iowa, 122 N. W. 961.

50.—**Public Policy.**—Discriminatory contracts between public utility corporations and their patrons which are void as inimical to the public good are void because unreasonable advantage is thereby given to one customer or a class over others.—*City of Superior v. Douglas County Telephone Co.*, Wis., 122 N. W. 1023.

51.—**Restraint of Trade.**—A contract by the seller of business stock and good will of a lumber yard not to engage in the lumber and coal business in the locality where the lumber yard was located, while the purchaser was there in business held not void on its face as against public policy.—*Engles v. Morgenstern*, Neb., 122 N. W. 688.

52. **Corporation—Dividends.**—A corporation held to have no right to make the defense, in behalf of either of certain parties, that its financial condition did not warrant the declaration of a dividend.—*Ball v. Peper Cotton Press Co.*, Mo., 122 S. W. 798.

53.—**Foreign, Inferiority of to Domestic.**—Acts Tenn. 1877, p. 45, c. 31, sec. 5, while constitutional in so far as it gives resident creditors priority over the claims of foreign corporations in the distribution of assets of foreign corporations doing business in Tennessee, is unconstitutional in so far as it gives the claims of Tennessee creditors priority over those of natural persons.—*In re Standard Oak Veneer Co.*, U. S. D. C., E. D. Tenn., 173 Fed. 103.

54.—**Fiduciary Relations.**—A foreign corporation doing business in Michigan was estopped

to set up as a defense that its transactions in that state were unlawful because of its failure to comply with the state laws.—*Showen v. J. L. Owens Co.*, Mich., 122 N. W. 614.

55.—**Legal Existence.**—A corporation can have no legal existence, except in the sovereignty of its creation, though it may do business in another state by its permission.—*In re Standard Oak Veneer Co.*, U. S. D. C., E. D. Tenn., 173 Fed. 103.

56.—**Personal Property.**—Shares of corporate stock held "personal property," and that for the purpose of a suit to quiet title their situs was the domicile of the corporation.—*Hamil v. Flowers*, Ga., 65 S. E. 961.

57.—**Pledge of Stock.**—Contingent interest of a pledger of a certificate of stock in the hands of the pledgee to indemnify it as surety for pledgor, held assignable in equity.—*Ball v. Peper Cotton Press Co.*, Mo., 122 S. W. 798.

58.—**Preferred Stockholders.**—Preferred stockholders held entitled to share with common stockholders in all profits distributed after the latter have received an amount equal to the stipulated dividend on the preferred stock.—*Sternbergh v. Brock*, Pa., 74 Atl. 160.

59.—**Ultra Vires.**—The defense of ultra vires is available only where the contract is executory, and not where the corporation has received the consideration for the agreement.—*Vermont Farm Machinery Co. v. De Sota Co-Operative Creamery Co.*, Iowa, 122 N. W. 930.

60. **Courts—Definition of Terms.**—The court is not required to define a term of ordinary use when used in its popular sense.—*Johnson v. W. H. Goolsby Lumber Co.*, Tex., 121 S. W. 883.

61. **Covenants—Running With Land.**—A railroad company's covenant to construct a station in consideration of a conveyance of land to it for a right of way held a covenant running with the land, and binding on the grantor's successor.—*Louisville, H. & St. L. Ry. Co. v. Baskett*, Ky., 121 S. W. 957.

62.—**Warranty.**—A grantee who has been evicted held entitled to sue a remote grantor unless he seeks to recover on a warranty in a deed by a remote grantor with knowledge of the fact that the conveyance was not intended to pass title.—*Snadon v. Salmon*, Ky., 121 S. W. 970.

63. **Criminal Evidence—Good Character.**—Good character of accused held to be taken in connection with the other evidence and given such weight as in the opinion of the jury it is entitled to.—*State v. Hartnett*, Del., 74 Atl. 82.

64.—**Statements by Wife of Accused.**—Statements by the wife of accused to an officer made where accused could have heard them while he was under arrest in the custody of another officer, held inadmissible against him as admissions.—*Hauger v. United States*, U. S. C. of App., Fourth Circuit, 173 Fed. 54.

65. **Criminal Trial—Evidence Illegally Obtained.**—Intoxicating liquors found in defendant's dwelling house pursuant to an illegal search and seizure held nevertheless admissible against him in a prosecution for selling liquor without a license.—*State v. Madison*, S. D., 122 N. W. 847.

66.—**Instructions.**—The court's failure to give any instruction with reference to one of the questions submitted for a special verdict was not error in the absence of a request there-

for.—*Monaghan v. Northwestern Fuel Co.*, Wis., 122 N. W. 1066.

67. **Damages**—Breach of Contract.—Plaintiff who contracted to saw into oak heading, timber to be furnished by defendants, held entitled to recover on a breach by defendants the profits he would have made had they carried out the contract.—*Hurley & Ross v. Oliver, Ark.*, 121 S. W. 920.

68.—Exemplary.—Exemplary damages are recoverable in an action for injury to personality where malice, fraud, or gross negligence is present.—*Lord v. Maine Cent. R. Co.*, Me., 74 Atl. 117.

69.—Impairment of Earning Capacity.—It should not be assumed, in estimating damages for personal injuries, that plaintiff will engage in no other pursuit than the one in which he was engaged at the time of the accident.—*Greenway v. Taylor County, Iowa*, 122 N. W. 943.

70. **Death**—Measure of Damages.—The question of pecuniary loss to a father by the death of his child, dangerously ill when the wrongful act complained of was committed, held a question of conjecture or speculation.—*Scherer v. Schlaebig*, N. D., 122 N. W. 1,000.

71.—Proximate Cause.—The negligent failure of a telephone company to connect a messenger dispatched to call a doctor with the doctor's telephone held too remote to constitute it a proximate cause of an injured person's death.—*Evans' Adm'r v. Cumberland Telephone & Telegraph Co.*, Ky., 121 S. W. 959.

72. **Deeds**—Illegal Consideration.—An agreement to convey property in satisfaction of an embezzlement, in consideration of a promise not to prosecute, is illegal.—*Jourdan v. Burtow*, N. J., 74 Atl. 124.

73.—Contemporary Construction.—Contemporary construction of a contract by acts of the parties to be entitled to weight, must appear to have been acts of both, with knowledge and with a purpose consistent with that to which they are sought to be applied.—*Sternbergh v. Brock, Pa.*, 74 Atl. 166.

74.—Habendum Clause.—The habendum clause in a deed is controlled by the caption and granting clause, unless it appears from the language of the whole deed that it was intended that the habendum clause should control or limit the right taken under the caption or granting clause.—*Hudson's Heirs v. Hudson's Adm'r, Ky.*, 121 S. W. 973.

75.—Undue Influence.—A deed obtained through the exercise of the grantee's influence over the grantor, by virtue of his position, will be set aside, though no actual fraud is shown.—*Bellamy v. Andrews*, N. C., 65 S. E. 963.

76. **Divorce**—Desertion.—To entitle a wife to divorce for constructive desertion, in that she was compelled to leave her husband because of his conduct, his conduct must be the degree of cruelty necessary to support a decree a mensa et thoro.—*Thomas v. Thomas*, N. J., 74 Atl. 125.

77. **Dower**—Assignability of Inchoate Dower.—A wife's inchoate dower interest, though not a lien, estate, or interest in land, possesses many incidents of property, and is extinguishable at her instance in favor of her husband, or his assignee or trustees in bankruptcy.—*In re Acretelli*, U. S. D. C., S. D. N. Y., 173 Fed. 121.

78.—Inchoate.—A widow, until dower is assigned, has no legal estate in her late hus-

band's lands that can be vested by her deed as against the heir at law.—*Fuchs v. Christie*, N. J., 74 Atl. 129.

79. **Easements**—Appurtenant.—An easement will not be held to be in gross if it can fairly be held to be appurtenant.—*D. M. Goodwillie Co. v. Commonwealth Electric Co.*, Ill., 89 N. E. 272.

80.—How Created.—Easements may be created by covenants or agreements as well as by grant.—*D. M. Goodwillie Co. v. Commonwealth Electric Co.*, Ill., 89 N. E. 272.

81. **Election of Remedies**—Condemnation Proceedings.—The attempt of a landowner to defeat condemnation proceedings was not such an election of remedies as would prevent him from litigating on appeal the amount of damages.—*Beckman v. Lincoln & N. W. R. Co.*, Neb., 122 N. W. 994.

82. **Eminent Domain**—Necessity of Payment Before Taking.—A landowner may enjoin a road overseer from entering his premises to prepare a highway thereon until the damages from the appropriation have been paid.—*Johnson v. Peterson*, Neb., 122 N. W. 683.

83. **Equity**—Legal Rights in Real Estate.—Equity has jurisdiction to enforce a legal right in real estate, if the right exists and plaintiff has no adequate remedy at law or the threatened damage is irreparable.—*Kiernan v. Jersey City*, N. J., 74 Atl. 139.

84. **Estoppe**—Changing Ground in Case.—Where a party gives a reason for his conduct touching anything involving any controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different ground.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle*, Tenn., 122 S. W. 981.

85.—Failure to Assert Claim.—Failure of contingent remaindermen to claim any interest in the property in controversy prior to the vesting of their remainders held insufficient to estop them to subsequently recover the land.—*Westcott v. Meeker*, Iowa, 122 N. W. 964.

86.—Fraud.—One who has recovered damages for fraud, in inducing him to become liable on a note, is estopped to defeat a subsequent collection of the note.—*Loy v. Alston*, U. S. C. C. App., Eighth Circuit, 172 Fed. 90.

87. **Evidence**—Ancient Document.—A sheriff's deed more than 30 years old, reciting a sale under a certain execution, held conclusive evidence of the issuance of the execution as recited.—*Gillean v. Witherspoon*, Tex., 121 S. W. 909.

88.—Judicial Notice.—The court will take judicial cognizance of an attachment without formal introduction of the papers in evidence.—*Johnson v. W. H. Goolsby Lumber Co.*, Tex., 121 S. W. 883.

89.—Parol Evidence.—Parol evidence is admissible to show the purpose for which a note was executed, where sued on by the payee.—*Davis v. Sterns*, Neb., 122 N. W. 672.

90.—Relevancy.—A sale consummated on terms embodied in an offer to sell is evidence of the true value of the property at that time.—*Belka v. Allen*, Vt., 74 Atl. 91.

91.—Res Gestae.—The declarations of a railroad claim agent, made to an injured servant with a view of obtaining a settlement of his claim, held admissible as a part of the res gestae.—*Vaillancourt v. Grand Trunk Ry. Co. of Canada*, Vt., 74 Atl. 99.

92. **Executors and Administrators**—Distribu-

tion.—After a final decree of distribution, a distributee can maintain an action against the administrator and his bondsmen for the amount assigned by such decree.—*Sjoli v. Hogenson*, N. D. 122 N. W. 1008.

93.—Right to Appointment.—One having no interest in the estate is not entitled to petition for the appointment of an administrator.—*Diem v. Drogmiller*, Mich., 122 N. W. 637.

94. Exemptions—Personal Privilege.—A right of exemption is a personal privilege, and may be waived by the debtor.—*Parketon v. Pugsley*, Mo., 121 S. W. 789.

95. Explosives—Dynamite.—Leaving a box of dynamite caps in a barn sold by defendant to plaintiff, which caps were subsequently found by children playing about the barn, whereby plaintiff's son was injured, held not in itself a negligent act.—*Finkbeiner v. Solomon*, Pa., 74 Atl. 170.

96. False Imprisonment—Damages.—Where a girl 16 years old was unlawfully detained by a charitable institution for the reformation of women and girls for seven years against her will, without the knowledge of her relatives, a recovery of \$2,500 was not excessive.—*Gallon v. House of Good Shepherd*, Mich., 122 N. W. 631.

97. False Pretenses—Evidence.—To sustain an indictment against a sheriff for presenting a fraudulent claim for the board of prisoners, evidence of the falsity of any one of the items is sufficient.—*State v. Hartnett*, Del., 74 Atl. 82.

98. Federal Courts—Administrator, Suit by.—A federal court held not to have jurisdiction of a suit by the principal administrator of an estate in another state to establish his right to funds in possession of a local probate court, which alone under the laws of the state had jurisdiction to determine such rights.—*Watkins v. Eaton*, U. S. C. C., N. D. N. Y., 173 Fed. 133.

99. Fire Insurance—Knowledge of Agent.—An insurance company held not charged with knowledge of a soliciting agent, so as to estop it from setting up as a defense a breach of condition in the policy; Code, sec. 1750 not being applicable.—*Scrivner v. Anchor Fire Ins. Co.*, Iowa, 122 N. W. 942.

100. Fraud—Opinion.—A representation, though false and fraudulent, is not actionable unless it be of a past or present fact, and not a mere expression of opinion.—*Belka v. Allen*, Vt., 74 Atl. 91.

101.—Purchase of Corporate Stock.—Fraudulent representations, made to induce persons to buy stock from a corporation, do not give a right of action for damages to one who purchased stock of the corporation from another stockholder, although he was induced to make the purchase by such representations.—*Cheney v. Dickinson*, U. S. C. C. of App., Seventh Circuit, 172 Fed. 109.

102. Frauds, Statute of—Promoter's Agreement.—A promoter's agreement to furnish plaintiff sufficient cash out of the purchase price of certain timber lands to be conveyed to a corporation to enable plaintiff to pay off liens thereon held an original undertaking, not within the statute of frauds.—*Maxey v. Rideout*, U. S. C. C., E. D. Wis., 173 Fed. 172.

103. Gaming—Gambling Transactions.—To make a transaction in stocks a gambling transaction, it must appear that neither party intended an actual purchase or sale, but that both

had the intention of settling on the differences, only.—*Pelouze v. Slaughter*, Ill., 89 N. E. 259.

104. Guardian and Ward—Sale of Ward's Land.—Confirmation of a guardian's sale of his ward's land under order of court, in some form, is necessary to pass title.—*Gillean v. Witherspoon*, Tex., 121 S. W. 909.

105. Highways—Prescriptive and Statutory Way.—Obstructions in highway or interruptions of the use are no more effective than overt acts, objections, or declarations by the land-owner.—*Pitser v. McCreery*, Ind., 89 N. E. 317.

106. Husband and Wife—Action for Separate Maintenance.—In an action for separate maintenance, where the marriage ceremony is admitted, but only its legality questioned, the court may make the wife an allowance for temporary alimony.—*Reifschneider v. Reifschneider*, Ill., 89 N. E. 255.

107.—Alienation of Affections.—In an action by a wife for alienation of her husband's affections, plaintiff may testify to declarations by her husband as to offers to him by defendants to induce him to abandon her.—*White v. White*, Wis., 122 N. W. 1051.

108.—Estoppel.—A married woman cannot be estopped to assert her rights in land except for fraud, or acts equivalent thereto.—*Gillean v. Witherspoon*, Tex., 121 S. W. 909.

109. Indictment and Information—Sufficiency, Test of.—The test of the sufficiency of an indictment is whether it sufficiently apprises defendant of what he must be prepared to meet, and is sufficiently explicit to avail on a subsequent plea of former conviction or acquittal.—*Haugher v. United States*, U. S. C. C. of App. Fourth Circuit, 173 Fed. 54.

110. Insane Persons—Appointment of Guardian.—Under Code, secs. 225, 3202, an independent decree of incompetency held not a pre-requisite to the appointment of a guardian of the property of a non-resident lunatic.—*Wallace v. Tinney*, Iowa, 122 N. W. 136.

111. Interest—Right to.—Equity will not be diligent to find reasons to permit a creditor to recover interest where the debtor has attempted to pay, and the creditor has by his own conduct lost the right thereto.—*Security State Bank of Washington v. Waterloo Lodge No. 102*, A. F. & A. M., Neb., 122 N. W. 992.

112. Joint Adventures—Implied.—A contract establishing a joint adventure need not be express, but may be implied from the conduct of the parties, and, when once the engagement has been made, the parties must act with the utmost good faith towards each other.—*Jackson v. Hooper*, N. J., 74 Atl. 130.

113. Judgment—Designation of Amount of Costs.—A judgment for costs which leaves blank the amount of the costs is valid, and the amount of costs may be inserted at any time.—*In re Brandes' Estate*, Iowa, 122 N. W. 954.

114.—Full Faith and Credit.—Under Const. U. S., art. 4, sec. 1, full faith and credit clause, a Virginia judgment against which the equity courts of that state could not relieve as having been based upon a gambling transaction must be allowed the same effect in North Carolina.—*Mottu v. Davis*, N. C., 65 S. E. 969.

115.—Holding Case Open After Judgment.—Held, that an equity court cannot, any more than a law court, hold a case open after judgment for further adjudication on the merits.—*Bali v. Peper Cotton Press Co.*, Mo., 121 S. W. 795.

116.—**Lien of Real Estate.**—A judgment is not a lien on real estate unless made so by statute.—*In re Brandes' Estate*, Iowa, 122 N. W. 954.

117.—**Res Judicata.**—A decree dismissing a bill to quiet title held no bar to a subsequent suit to quiet title.—*Kenealy v. Glos*, Ill., 89 N. E. 289.

118.—**Res Judicata.**—A judgment dismissing an action on a contract against a defendant as a member of a partnership held not a bar to a subsequent action on the same contract against him as an individual.—*Millie Iron Mining Co. v. McKinney*, U. S. C. C. of App., Sixth Circuit, 172 Fed. 42

119. **Justices of the Peace—Impeachment.**—A judgment convicting a justice of the peace of oppression in office held an impeachment proceeding, in so far as it ousted him from his office, and was properly so rendered, without the necessity of quo warranto proceedings.—*State v. Parks*, Tenn., 122 S. W. 977.

120. **Landlord and Tenant—Indian Allottee.**—A grantee of an Indian allottee held not estopped to deny the title of certain of his lessors, from whom he had accepted a lease during part of the period he was in possession, at least after the term had expired.—*Meeker v. Kaelin*, U. S. C. C. N. D. Wash., 173 Fed. 216.

121. **Libel and Slander—Circulation of Libel.**—Where a petition alleged the circulation of a libel in S. and vicinity, evidence of its circulation in C. held inadmissible.—*O'Neill v. Adams*, Iowa, 122 N. W. 976.

122.—**Privilege.**—A libelous communication, known by the writer to be false and intended to prevent plaintiff from going into business for himself, held not privileged.—*National Cash Register Co. v. Salling*, U. S. C. C. of App., Ninth Circuit, 173 Fed. 22.

123.—**Special Damages.**—Plaintiff could not recover for loss of alleged sales of intoxicating liquors, resulting from defendant's libelous publications, where the sales, if made, would have been illegal.—*O'Neill v. Adams*, Iowa, 122 N. W. 976.

124. **Life Insurance—Construction.**—Insurance contracts must be liberally construed in favor of the insured.—*Roseberry v. American Benevolent Ass'n*, Mo., 121 S. W. 785.

125.—**Reduction of Damages.**—Where defendant discharged plaintiff as district insurance agent, so as to destroy the business plaintiff had built up, defendant was not entitled to set off what plaintiff had earned by other employment after defendant's breach, against damages for future profits.—*Richey v. Union Cent. Life Ins. Co.*, Wis., 122 N. W. 1030.

126. **Limitation of Actions—Infancy.**—Children delaying more than three years after reaching their majority to sue their father for an accounting for rents of a homestead belonging to the wife held barred by limitations.—*Carroll v. Carroll*, Ark., 121 S. W. 947.

127. **Malicious Mischief—Evidence.**—In a prosecution for injuries to the building of another, in violation of Shannon's Code, sec. 6496, subd. 1, possession only need be proved.—*Deaderick v. State*, Tenn., 122 S. W. 975.

128. **Marriage—What Law Governs.**—The law of the state where a marriage takes place governs its legality, rather than that of the residence of the parties.—*Reifschnieder v. Reifschnieder*, Ill., 89 N. E. 255.

129. **Master and Servant—Assumed Risk.**—An employee repairing a bridge assumes all risks ordinarily present in such dangerous operations.—*McPherson v. Great Northern Ry. Co.*, Wis., 122 N. W. 1022.

130.—**Assumed Risk.**—In an action for injuries to an employee while oiling certain machinery, evidence showing how others oiled the machinery prior to plaintiff's employment was admissible on the issue of contributory negligence.—*Monaghan v. Northwestern Fuel Co.*, Wis., 122 N. W. 1066.

131.—**Duty of Master.**—A master under duty to protect a servant engaged in setting up a machine need only exercise ordinary care in case the injury to the employee could have been foreseen by an ordinarily prudent person.—*Dawson v. King*, Tex., 121 S. W. 977.

132.—**Duty to Inspect Tools.**—A servant, without knowledge of notices requiring inspection of tools, held not required to make such inspection.—*Gulf, C. & S. F. Ry. Co. v. Adams*, Tex., 121 S. W. 876.

133.—**Employer's Liability Act.**—The employer's liability act held not retroactive.—*Winfree v. Northern Pac. Ry. Co.*, U. S. C. C. of App., Ninth Circuit, 173 Fed. 65.

134.—**Look and Listen.**—A servant injured in a railroad yard while crossing a track behind certain standing cars held not negligent as a matter of law in failing to look and listen before attempting to cross.—*Toledo, St. L. & W. R. Co. v. Bartley*, U. S. C. C. of App., Sixth Circuit, 172 Fed. 82.

135.—**Safe Plea to Work.**—A servant is not bound to look for hidden danger in the place given him by his master in which to work.—*Mason, Hanger & Coleman Co. v. Henry*, Ky., 121 S. W. 1001.

136. **Mortgages—Deed Absolute in Form.**—Parol evidence is admissible to show a deed absolute in form was intended to be a mortgage.—*Mahaffy v. Faris*, Iowa, 122 N. W. 934.

137. **Municipal Corporations—Lien.**—Assignment of a subcontractor's claim against a contractor for a municipal improvement did not give the assignee a lien on the fund due the contractor, until the subcontractor had acquired a lien by filing the statutory notice.—*National Fire Proofing Co. v. Daly*, N. J., 74 Atl. 152.

138.—**Ordinances.**—An ordinance which only prescribes a minimum and not a maximum penalty is void for uncertainty.—*Arnett v. Cardwell*, Ky., 121 S. W. 964.

139. **Negligence—Frightening Animals.**—Where plaintiff's horse was frightened and ran away by reason of a searchlight thrown upon him from defendant's amusement park, the facts were sufficient to establish defendant's negligence.—*Maisis v. Metropolitan Amusement Ass'n*, Ill., 89 N. E. 268.

140. **New Trial—Newly Discovered Evidence.**—On an application for a new trial for newly-discovered evidence, the affidavit of the new witness must be filed, and show that the testimony will be available on another trial.—*Gulf, C. & S. F. Ry. Co. v. Adams*, Tex., 121 S. W. 876.

141. **Oath—Statement of Attorney.**—A professional statement of an attorney, when received by the court, is equivalent to an oath.—*In re Winslow's Will*, Iowa, 122 N. W. 971.

142. **Officers—De Facto.**—De factio acts of binding force may be performed under pre-

sumption of law.—*State v. Poulin*, Me., 74 Atl. 119.

143. **Pardon**—Restoration to Office.—Under Const., art 8, sec. 6, a Governor's pardon of a Justice of the peace, convicted of oppression in office, was ineffective to restore the office.—*State v. Parks*, Tenn., 122 S. W. 977.

144. **Parties**—Complaint.—Where a complaint shows that one of the parties joined as plaintiffs had no interest in the controversy, it is demurable for want of facts.—*Thompson v. Turner*, Ind., 89 N. E. 314.

145. **Partnership**—Dissolution.—A partner held entitled, after dissolution of firm, to bring action against a co-partner for an accounting, though the firm debts have not been paid.—*Adams v. Carmony*, Ind., 89 N. E. 327.

146. **Pawnbrokers**—Licenses.—Under an ordinance providing for license tax on pawnbrokers and one upon persons retailing pistols, held, that a pawnbroker selling pistols at retail must obtain both licenses.—*Stevens v. City of Louisville*, Ky., 121 S. W. 977.

147. **Payment**—Receipt.—A receipt obtained from a distributee through fraud is invalid, and open to impeachment.—*Sjoli v. Hogenson*, N. D., 122 N. W. 1008.

148. **Perpetuities**—Restriction of Alienation.—At common law the limitation by way of executory devise to be valid must be so made that the estate must vest in possession within a life or lives in being, and 21 years and 9 months; the period running from the death of the testator.—*Hays v. Martz*, Ind., 89 N. E. 303.

149. **Railroads**—Injury to Person on Track.—If a person injured by a train could have seen the train if he had looked, or could have heard it if he had listened, he was negligent in going upon the track.—*Rowe v. Chicago, M. & St. P. R. Co.*, Iowa, 122 N. W. 929.

150.—Injuries to Persons on Track.—A railroad engineer, on discovering the peril of a person on the track, must use every means within his power to avoid running him down, and this duty continues until the danger of a collision is past.—*Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, Tex., 121 S. W. 871.

151. **Religious Societies**—Ecclesiastical Tribunals.—The interpretation put upon its dogmas by a church held binding on its members, but not on those who are not.—*Boyles v. Roberts*, Mo., 121 S. W. 805.

152. **Removal of Causes** — Amendment.—Where the citizenship of one of the parties at the commencement of the action is not specifically shown by the record on removal of a cause, but may reasonably be inferred, an amendment of the petition may properly be allowed to state such fact.—*Kyle v. Chicago, R. I. & P. Ry. Co.*, U. S. C. C., N. D. Ark., 173 Fed. 238.

153. **Sales**—Advertising.—Acts 1889, p. 117, c. 81, held to require a seller, advertising the property by printed hand bills, to distribute them a reasonable time before the sale.—*J. I. Case Threshing Mach. Co. v. Watson*, Tenn., 122 S. W. 974.

154.—Auctioneer's Memorandum of Sale.—In an action by a buyer at public sale for damages from refusal of the seller to deliver the purchase, the written record of sale, so far as it related to the purchase in question, was admissible as a memorandum made by the clerk acting as agent for both parties.—*Kendall v. Boyer*, Iowa, 122 N. W. 941.

155.—**Rescission**.—Where a seller clearly declares to a buyer his determination to insist on the sufficiency of a machine sold him, and refuses to accept its return in any way, the buyer need not, pursuant to the contract, return it to the place where received as condition precedent to his right to rescind for breach of warranty.—*J. I. Case Threshing Mach. Co. v. Johnson*, Wis., 122 N. W. 1037.

156. **Street Railroads**—Protection of Passengers.—A carrier must exercise a very high degree of care to protect its passengers from misconduct, assaults, or injury by its servants.—*Missouri, K. & T. Ry Co. of Texas v. Gerren*, Tex., 121 S. W. 905.

157. **Taxation**—Injunction.—That an officer is proceeding to collect a tax by an unconstitutional method or without legislative authority is not sufficient to give a court of equity jurisdiction to grant an injunction, where complainant has an adequate remedy at law.—*Pullman Co. v. Tamble*, U. S. C. C., N. D. Tenn., 173 Fed. 200.

158. **Telegraphs and Telephones**—Contracts.—A stipulation in a contract for the transmission of a telegram from a sister state to a point in North Carolina will not be recognized by the courts of North Carolina because contrary to the public policy of the state, though it is valid in the sister state.—*Williamson v. Postal Telegraph Co.*, N. C. 65 S. E. 974.

159. **Trespass**—Title.—In a prosecution for malicious mischief, in violation of Shannon's Code, sec. 6496, it was no defense that defendant's employers had a better title to the land in question than prosecutor.—*Deaderick v. State*, Tenn., 122 S. W. 975.

160. **Trial**—Direction of Verdict.—Where the evidence is such that no verdict for plaintiff can be returned except one based upon conjecture, held proper to direct a verdict for defendant.—*Scherer v. Schlaberg*, N. D., 122 N. W. 1000.

161. **Trusts**—Concealed Property.—Persons who received from another and concealed property with knowledge of a claim that it was obtained by fraud, on an accounting therefor as trustees, held not entitled to a deduction on account of salaries agreed to be paid them for their services in caring for the property.—*United States v. Carter*, U. S. C. C. of App., Seventh Circuit, 172 Fed. 1.

162.—**Validity of Oral Trusts**.—A parol agreement of the grantee in a conveyance of land to hold it for the use and in trust for the one furnishing the consideration is valid and not within the statute of frauds.—*Smith v. Smith*, Ky., 121 S. W. 1002.

163. **Vendor and Purchaser**—Assignment of Contract.—A contract for the sale of land vested in the purchaser rights which he could transfer to another.—*Durham v. Breathwit*, Tex., 121 S. W. 890.

164.—**Defective Title**.—A purchaser, who has received a conveyance with warranty and has been put in possession, cannot resist payment because of a defective title, unless vendor is insolvent, or a non-resident, or has practiced actual fraud.—*Atkinson v. Hager*, Ky., 121 S. W. 955.

165. **Waters and Water Courses**—Right of Flowage.—A right of flowage of upper riparian lands can be obtained by uninterrupted adverse possession and user.—*Gross v. Jones*, Neb., 122 N. W. 681.

166.—**Upper Proprietor, Use by**.—In determining whether the use of a stream by an upper proprietor is reasonable, the size and character of the stream and the use to which it is subservient are pertinent.—*Lawrie v. Sigsby*, Vt., 74 Atl. 94.

167. **Wills**—Construction.—Equity will not entertain a suit to construe a will brought by persons who have no interest therein.—*Garrard v. Kendall*, Ky., 121 S. W. 997.

168.—**Mental Capacity**.—It requires less mental capacity to make a will than to make a contract or a deed, or to transact business generally.—*In re Winslow's Will*, Iowa, 122 N. W. 971.

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THE RULE OF ELECTION WHERE PRINCIPAL OF AN AGENT IS SUBSEQUENTLY DISCOVERED.

In Mechem on Agency, Sec. 696, it is said to be "a rule of law that an undisclosed principal, when subsequently discovered, may, at the election of the other party, if exercised within a reasonable time, be also held liable upon all simple contracts made in his behalf by his duly authorized agent, although the credit was originally given to the agent under a misapprehension as to his true character."

Then the author speaks of two exceptions to that rule, one being that founded on estoppel in settlement by principal with agent in good faith prior to such election, and the other, where the creditor, after discovery of principal and having the power to choose between him and the agent, distinctly elects to treat the agent alone as the party liable. It is to be noticed, that the rule does not state that election substitutes the principal's liability for that of the agent, but it says the principal may by election "be also held liable," and the exceptions are to those things which merely prevent the principal from *also* "becoming liable," all the while going upon the theory that the agent remains liable.

It is to be noticed that reference is only to non-action, or action of which the principal may take advantage, and therefore either acquiescence towards or action against the agent of an undisclosed principal remains governed by the contract status between the original parties. In other words, the rule as above formulated gives to the creditor the privilege of resort "also" to the principal, subject only to certain exceptions in the latter's favor.

Now, if the above is a correct statement of the rule how stands this statement from a Missouri and other cases: "A party who enters into a contract with the agent of an

undisclosed principal may, after the principal has been disclosed, proceed either against the agent or against the principal; but he cannot proceed against both, and if he proceeds against one, although unsuccessfully, he cannot thereafter proceed against the other." Sessions v. Block, 40 Mo. App. 569.

We do not take any exception here to the inhibition embracing a mere proceeding, but we will consider, that the court intends to say proceeds *to judgment*, so that whatever in the way of conclusiveness as to election may legally arise shall be deemed to have arisen. What we wish to stress is, that the Mechem rule is that, election adds a new debtor while by the other rule it releases an old, by taking on a new, debtor, if it takes that direction.

In the first place, the latter effect does not appear to rest upon any rule of consideration. The agent is liable because credit is extended to him; the principal is liable because he received the benefit, and should pay under the rule *ex aequo et bono*.

In the second place, the liability of principal is solely for the creditor's benefit and there is no justice in his being put to any peril by reason of any disadvantage at the outset of the transaction.

But let us inquire into the cases in which the latter expression of the rule has been announced. No better illustrations may be found than the Sessions case, *supra*, and that of Barrell v. Newby, 127 Fed. 656, 62 C. C. A. 308, and the authorities they cite.

It is to be said, that both of these cases would have been decided exactly as they were decided, under the Mechem rule and its exceptions. Also so seem the cases cited by the opinions in both cases. Therefore, any extension of that rule was *dictum*.

The Missouri case quotes from Lord Cairns' opinion in Kendall v. Hamilton, L. R. 4 App. Cas. 504, his being the only opinion referring to principal and agent, and himself and all the other Lords basing their ruling mainly upon another consideration.

But Lord Cairns said: "It would be clearly contrary to every principle of justice that the creditor who had seen and known and dealt with and given credit to the agent, should be driven to sue the principal, if he does not wish to sue him, and, on the other hand, it would be equally contrary to justice that the creditor, on discovering the principal, who really had the benefit of the loan, should be prevented suing him, if he wished to do so. But it would be no less contrary to justice, that the creditor should be able to sue first the agent and then the principal, when there was no contract and when there never was the intention of the parties that he should do so." Thereupon the court refers to *Priestly v. Fernie*, 3 H. & C. (Exchq.) 979, 34 L. J. Eq. 175.

The latter case has been referred to so often in the cases as to be regarded as the source of the election rule, and it is therefore important to examine it.

The *Priestly* case was summarized in *Maple v. Railroad*, 40 Oh. St. 313, as a rule releasing the *principal* "upon the ground of election and upon the additional consideration that the judgment against the agent altered the situation of the principal." The *Maple* case considered it authority for the conclusion, that a ^{principal} should not be released, where a prior judgment had been obtained against him for misrepresentation to a customer of his principal, out of which misrepresentation the cause of action arose, because under those circumstances the agent would have no action over against the principal, and therefore the latter was not affected. The *Priestly* case said that the agent, generally, would have an action over against the principal whether he paid the judgment or not, and therefore, if the agent were sued to judgment, the principal became thereby released. It is evident that the same cannot be said where the principal has been first sued to judgment.

Rounsville v. Insurance Co., 138 N. C. 191, 196, referring to the *Priestly* case and the rule it announced, said: "Convincing reasons are given in support of the prin-

ple and it seems to have received the support of the text writers and the courts of this country."

That case, however, gave no reasons whatever for not holding an agent when the principal's liability had been fixed by election, or suit against the principal to judgment.

In *Jones v. Insurance Co.*, 14 Conn. 501, it is said: "If a person deals with another not knowing his agency, when the principal is disclosed, he may pursue the principal, but, if he elects to give credit to the agent he cannot pursue the principal." For this is cited the English cases of *Paterson v. Gaudasequie*, 15 East. 62; *Addison v. Gaudasequie*, 4 Taunt. 574, and *Beebe v. Robert*, 12 Wend. 413, 417.

In Massachusetts the rule appears as secondly above stated, if we may judge from the holding in *Weil v. Raymond*, 142 Mass. 206, that both principal and agent cannot be sued conjunctively or severally in one suit, though this case shows that this broad ruling was unnecessary.

The *Mechem* rule appears to be recognized in an older Alabama case, *Cleaveland v. Walker*, 11 Ala. 1058, as the first exception stated by Mr. *Mechem* is there applied.

In all of the cases of prior judgment against the agent it was unnecessary to distinguish between prior judgments against principals and therefore a dissection of the rule was not called for. In *Codd Co. v. Parker*, 97 Md. 319, the question of distinction, if any exists, could have been raised but was not. The court merely enforced the rule, where the principal was first sued to judgment, assuming it to be a strictly technical rule in the form secondly above stated.

The rule, however, seems never to have been so recognized or established, but merely one of estoppel.

It appears in the *Priestly* case that there were two obligors, bound for two well recognized, but diverse, reasons and this case, thus presupposing, says the one secondly liable cannot be held under certain circum-

stances, not hinting at any release of the party primarily liable.

The contract between the original parties is at the start, like any other contract. Investigation or chance subsequently may aid or be intended to aid the creditor in its enforcement. Discovery of this aid may be wholly independent of any act or wish, or even against the wish, of the primary party. If the aid comes it cannot possibly work to his prejudice, because of any step the discoverer may take or refuse to take.

And, yet, that discoverer is, for the benefit enuring to the primary party as well as himself, put in peril in seeking to avail himself of it. There is certainly no such rule for the primary debtor in the doctrines of principal and surety, maker and indorser, principal and guarantor, as those relations are generally understood. But—is not the agent of an undisclosed principal the principal for the creditor and the agent's principal—the creditor's guarantor to be resorted to at the creditor's election?

See how fatally some of the courts proclaim is the working of this double rule, when they hold, as has been held, that judgment even without satisfaction cuts off the creditor. They concede, that an election is only conclusive upon the facts being known. Therefore we will suppose the creditor first sues the principal, who is financially preferred, and judgment is rendered for defendant. But this is not held to show the creditor was misinformed as to the facts. The agent's contract has, however, been abrogated, because there was a supposedly well advised election.

In the case of *Beymer v. Bonsell*, 79 Pa. 298, prior judgment against the principal was pleaded but the claim of election was rejected. The court did not distinguish in the way we are urging between principal and agent, but on every principle of justice its decision seems right, as nothing whatever resembling the exceptions stated by Mechem appeared. This rule, as a shield of justice, should not be changed to a sword of injustice, merely because of careless utterances by courts.

NOTES OF IMPORTANT DECISIONS.

TORTS—ACTIONS FOR INJURIES IN PRISON.—In the action of *Leigh v. Goldstone* (Times, December 10) one of the women suffragists sued the London English Home Secretary, the governor of the prison, and the medical officer of the prison, for damages for assault in forcibly feeding her. No points of law were decided, or are likely to be decided, in connection with this case, for, according to the report, "the jury, after considering two minutes, returned a verdict for the defendants and judgment was entered accordingly."

Whether any civil action or other proceedings for assault and injuries suffered in prison can be brought as a matter of law, remains, therefore, a question still unsettled in England. There appears to be no precedent, says the *Solicitor's Journal*, for an action in respect of an alleged tort suffered by a prisoner during incarceration. The experiment was tried in New South Wales some years ago by a convict who lost his eye through the bursting of the gauge glass of a steam engine, but without success. This case is *Gibson v. Young* (1899) 21 N. S. W. R. 7. The convict was put to work in the gaol at a steam engine, and it was alleged that, through the negligence of the prison authorities, the gauge glass broke and injured the plaintiff, with the result that he lost the use of one eye. The point of law was raised in the form of a demurrer to the declaration under the Common Law Procedure Act, that no cause of action was disclosed, and the demur-
rer was upheld. The action was brought against a nominal defendant on behalf of the government (under the colonial procedure), and in England would have been by petition of right against the crown. The Supreme Court held unanimously that the action would not lie, the principal ground of decision being that it was against public policy that the executive should be liable to any such action. It was, however, also said that the action would equally have failed had it been brought directly against the prison authorities. In England an action *ex delicto* cannot be brought against the crown, even by petition of right, whereas in New South Wales, and many other parts of the over-sea dominions, such an action is allowed by statute. See the judgment of the Privy Council in *Farnell v. Bowman*, 12 A. C. 643. It follows that the reasons which militate against the right of a prisoner in New South Wales to sue for a tort committed by the prison authorities, apply a fortiori in England.

ERROR IS PRESUMED TO BE PREJUDICIAL UNLESS IT AFFIRMATIVELY APPEARS THAT IT IS NOT.

Kansas holds the record in espousing popular reforms, and as far as known, it is first, or at least, among the first, to mold the latest popular fad, to eliminate technicality from the law, into its new code of civil procedure. Here is the section:

Section 581. "The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors in the proceedings of the trial court."

There has been persistent condemnation in the recent past of delays in litigation, both civil and criminal, due to reversals of judgments and orders of trial courts, by the appellate tribunals. It is well known that the president of the United States has expressed himself as decidedly against this practice. On June 26th, 1905, in an address before the Yale Law School he said: "No judgment of a court below should be reversed, except for an error which the court after reading the entire evidence can affirmatively say would have led to a different result." Other noted men of national reputation have deplored and denounced the practice of reversing cases. When presidents, or other men of such celebrity emit an idea, whether well considered or only half baked, many people waive all reason and take this for gospel, and quite often state legislatures avail themselves of the opportunity to prove their party loyalty by legislating presidential hobbys into the

state statute books. The one above quoted was so begotten.

That delays in litigation are expensive and annoying is freely conceded, but it is not true that the most vexatious delays result from reversals of cases. The delays which are the most annoying to lawyers, and the most expensive and damaging to litigants are, in a large measure, traceable to the congested state of court dockets. From a year and a half to two years often elapse between the time of the commencement of an action, and its final disposition in the trial court. This is a condition which prevails almost everywhere. It is bound to become more acute with the increase of new laws and penalties for their infraction. In some districts, comprising more than one county the law allots but a specified number of days to each county for the purpose of holding court therein, and the court can hardly ever dispose of pending business within the time allotted; consequently all unfinished business must be carried over to the succeeding term, and term after term, and year after year the work accumulates and the court gets farther behind. The corrosion of time acts on the causes of action, and wears out justice. In districts consisting of but one county, the business of the several terms of court therein often laps over, and the result is the same—the court is usually away behind. Those who have important matters pending naturally clamor to be heard, and the court is often over-worked and hurried, so that the judge cannot take the necessary time to properly consider the questions involved in the cases before him. He soon forms the habit of taking a judicial shot at a case and then passing it up to the supreme court. This tends to increase the number of appeals, and consequent delays in obtaining records from the stenographer, who, of course, cannot attend court and take testimony and at the same time make transcripts in cases which have been tried. Therefore, parties must wait until the stenographer gets ready. A tendency to appeal many cases from the district or trial courts

crowds the dockets of the supreme court, and so in most jurisdictions that court is from one to three years behind. It is not unusual that it takes from three to five years for an aggrieved party to obtain his rights in court, without encountering a single extraordinary dilatory move or technicality resulting in delay. After this long wait a case is finally heard before the supreme court, generally composed of seven justices. This court disposes of from seventy-five to one hundred cases each month. Ten days are usually consumed each month in the hearing of oral argument. This leaves about fifteen working days within which to read and consider from seventy-five to a hundred more or less lengthy and complicated records, or abstracts, twice that number of lawyers' briefs, and then write opinions in each case. It becomes necessary to divide the work, and each judge is obliged to hurry through ten or more cases, in about fifteen days. In those jurisdictions where there are quarterly or semi-annual sessions, the proportion remains about the same as above instanced, and so where there are more or a less number of judges. The lawyers in these cases who are not very much inferior in ability to the average supreme judge, spend from ten days to two weeks in the preparation of the brief and argument in any one case. But at the end of the month all the justices concur," and the inference is forced upon us that all the justices have really taken active part in all of the cases, which, as a matter of fact, had their decisions ground out as if by machinery. Then we say, our courts are weak. Ought it not to be clear to any one that under existing conditions the judges of the appellate courts cannot do very much with the cases before them, except to hurriedly glance at the citations and precedents, and as near as possible decide the cases according to what to them seems to be somewhere in line with such precedents? Is it a wonder that our modern decisions are almost devoid of originality, and that many unusual mistakes and consequent delays occur?

These things, however, must not be laid at the door of the law. Neither are they due to technicalities in the law. Nor is it necessarily true that the judges are weak, inferior or wanting in knowledge or capacity. The trouble is that we have too many laws and not enough judges. We do not need more courts. Obviously, to increase their number would only tend to aggravate the matter. We want more judges in the trial and appellate courts.

An editorial in one of the leading law journals contains the following on this subject: "It is an oft repeated remark that the opinions of the judges of an earlier day show a deeper consideration and more careful work generally than those of recent years. The reason is plain enough. Our judges of today have, man for man, infinitely more work to do and a greater demand upon their time, and are victims of too much law made by legislatures and courts, while the old-time judges had a deeper knowledge of fundamentals. We are apt to think, with the progress of time, we are moving away from the principles which guided our fore-fathers in their judgments. We forget that Rome developed arts and sciences which modern effort has failed to equal, and that the philosophy of the law was never better known than in the days of Justinian, who saw the necessity of gathering the best principles into form from the masses of opinions of great legal lights, as clashing and conflicting as those which in modern times confuse and befog the minds of our judges, and thus constantly add to existing chaps. Codes have been introduced to escape from the perplexities which grew up with the common law procedure, but the codes in most states have proven a delusion and a snare, because of the manner of their interpretation, and the ineffectual efforts of legislatures to afford relief. The most important function of government is the securing of wise laws. It must then be apparent that the securing of men of high moral principles and conceptions, deeply learned in the fundamental principles of the law

(to preside over the courts), should be the chief endeavor of political policy. * * * These men should not be over-worked, but they should have ample time for the consideration of every case brought before them. * * * It is good economy to secure the best ability for the bench. A judge who has to learn fundamental principles after he has gone on the bench, clogs the progress of the courts' business, if he does conscientious work, and it is better to go slow and be sure than to rush through ill-considered opinions. A bull turned loose in a china shop could not begin to create the havoc that a judge may, who slashes around among the datum posts of the law which centuries of wise men have established. * * * The forming and writing of correct legal opinions requires the highest order of ability, and great pains and care in the efforts to keep up with the work. It is not surprising that many mistakes are made, and that in the attempt to discriminate between conflicting opinions the best course is frequently not adopted."

Revision of procedure acts, and legislative construction of laws as a general rule only add to troubles sought to be corrected. Broadsides like that in President Roosevelt's message to congress, December 4th, 1906, can serve only to set in motion radical agitation, resulting in the enactment of unheard-of statutes, often injuring most those whom it was thought it should specially benefit. President Roosevelt said: "I would like to call attention to the very unsatisfactory state of our criminal law, resulting in large part from the habit of setting aside the judgment of inferior courts on technicalities, absolutely unconnected with the merits of the case, and where there is no attempt to show that there has been any failure of substantial justice." Attorney General Bonaparte, November, 1908, in an address before the National Municipal League, dramatically demanded: "Why need there be a foretaste of eternity between arrest and indictment, another between indictment and trial, and yet another between trial and punishment?" His own

answer is, "partly because the bench and the professional opinion among the bar tolerate all kinds of dilatory, frivolous and often ridiculous proceedings on the part of unscrupulous counsel intended to cheat justice of her plain due, and partly because our law-makers afford almost infinite facilities for review of judicial action to the criminal, although being very stingy in allowing them to the government."

The law is a system of rules, and these must necessarily be couched in technical terms, and in the very nature of things must be applied according to fixed rules. To say that appellate courts shall disregard all technical errors and irregularities which do not affirmatively appear to have prejudiced the rights of the complaining party, is to say that courts of review shall be abolished. Reviewing courts have no functions except to pass upon the decisions of inferior courts and to correct their errors. It is impossible in most instances for an appellant to show affirmatively that he has been prejudiced by an error of law, however gross, committed by the trial court at the trial, for this, in most cases, depends on the effects produced by the obnoxious matter upon the minds of the jurors or triers of the facts, which, of course, cannot be reliably shown. The law has properly limited inquiry here. It is equally difficult, if not impossible, for a reviewing court to determine, as a matter of law, that no prejudice has resulted from the commission of an error against the complaining party. The effect of such statutes against reversals and technical law would make out of appellate courts mere trial courts, instead of courts of review. And their trials, at that, would have to be conducted upon cold error-distorted records, coming up from the court below. It was tried in North Dakota to make the supreme court a tribunal for the trial de novo on appeal. It was found necessary, in connection with this novelty in procedure appellate, to let all evidence offered go in, although it consisted of Ayer's Almanac, or Webster's Unabridged, bodily. The trial judges, un-

der this law, became mere referees for the taking of testimony in such cases. With all this before them, the supreme judges found (and so expressed it) that they were not in as good a position to decide truly, upon the cold record, as the trial judge was, when he had the live case, with the witnesses themselves before him. It resulted in more and more delay, witness the numerous reversals and remandings under Section 5630 of the Revised Statutes, N. Dak. To make an appellate court something other than a court of review for the correction of errors, is foreign to the entire scheme and trend of the law.

Manifestly no invariable rule or standard can be adopted by a court, even as to when an error committed by an inferior tribunal shall be ground for a reversal of a judgment. Nor can there be a graduated scale by which to distinguish the so-called technical errors from the main body of error in law. They are all technical, or else quite unavailing for want of precision. Much less can it be properly adjudged, in advance, by a legislature that "error shall be disregarded." Such statutes should be disregarded, or, better, declared unconstitutional, as encroachments upon the province of the judiciary.

A case on reaching the appellate court is clothed with certain presumptions in favor of the rightfulness of whatever has been done in the lower court, and as a part of this presumption there is at the outset of the examination of every case in an appellate court a presumption that the verdict was right. But when it is made to appear to that court that the jury were misdirected on a matter of law, or if some other error which may have improperly influenced them in arriving at a conclusion in the case against the complaining party, is pointed out to that court, this general presumption (that the verdict and all the trial proceedings were right and proper) gives way, and a contrary presumption obtains—that a conclusion based upon an erroneous conception as to the law is itself erroneous. Unless, then, there is that in the record

which clearly rebuts this presumption, the judgment must be reversed, because of such mistake, and some courts even refuse to look into the evidence for the purpose of determining whether it sustains such finding.¹

The whole effort of the courts of error is to see that the intermediate steps by which the verdict or decision was reached were free from legal error. They do not inquire whether the jury were actually misled by the errors committed, but the investigation is limited to whether the error was calculated to mislead them.²

The sound view is that where the record on appeal shows errors committed by the trial court against the right of the complaining party, and where such error has been saved by proper exception, and where the complaining party has done nothing to estop him from alleging the error as ground for appeal, or where such errors have not otherwise been cured, and there is not that in the record which shows to a reasonable or moral certainty that the decision was right, or that a new trial, if properly conducted, must lead to the same result, a new trial must be granted.³ Or if the record does not show what effect an error upon a material point in the case may have had upon the decision, and in the nature of things it cannot show this, a new trial must be granted.⁴ The mere fact that the court, if sitting as the trier of fact, would reach the same conclusion from the evidence disclosed by the record, is not sufficient to warrant the ignoring of a vital error in the introduction of proof or in the instructions in jury cases. In short, the majority of the courts presume prejudice from error, once it is shown to exist, and require the party defending against error to show that no

(1) *Young v. Pacific Mail S. S. Co.*, 1 Cal. 353; *Chandler v. Fulton*, 10 Tex. 2; *Boyden v. Moore*, 5 Mass. 365; *Dudley v. Sumner*, 5 Mass. 438; *Lane v. Cromble*, 12 Pick. 177; *James v. Langdon*, 7 B. Mon. 193; *Field v. Deatley*, 10 B. Mon. 4.

(2) *Benham v. Cary*, 11 Wend. 83; *Hastings v. Bangor House, Proprietors*, 18 Me. 436; *Potts v. House*, 6 Ga. 325.

(3) *Thacher v. Jones*, 31 Me. 528; *Noyes v. Sheppard*, 30 Me. 17.

(4) *Gaines v. Buford*, 1 Dana, (Ky.), 481; *Beaver v. Taylor*, 1 Wall. (U. S.), 637.

harm resulted. This is quite the reverse of what is directed in the statute and theories under consideration.⁵ Where ruling indicates radically wrong theory of case prejudice will be presumed.⁶

Where evidence is improperly admitted the *prima facie* presumption is that it was considered by the jury in reaching a verdict.⁷ Prejudice is presumed from exclusion of evidence as to damages in actions sounding in tort, and the court cannot look into the evidence to determine whether there has been prejudice.⁸ Prejudice is presumed from striking out a defense where it does not appear from the record that the judgment would have been the same had the defense been considered.⁹ Erroneous instructions are presumed prejudicial.¹⁰ It is only when it is clear that no prejudice resulted or could have resulted that the judgment may be affirmed.¹¹ Exclusion of material evidence is reversible error, unless it appears beyond reasonable doubt that such exclusion was harmless.¹² Where it is impossible to ascertain whether the jury were influenced by the incompetent evidence, its admission calls for reversal.¹³

(5) *In re Deans' Estate* (Cal.), 87 Pac. 13; *Lake Erie & W. R. Co. v. McFall*, 165 Ind. 574; *Englander v. Fleck*, 101 N. Y. Supp. 125; *Dunn v. Currie* (N. Car.), 53 S. E. 533; Mo., etc., R. R. Co. v. Williams, 16 Tex. Ct. Rep. 847; *Grote v. Molton* (Vt.), 64 Atl. 453.

(6) *Booneville National Bank v. Blakey* (Ind.), 76 N. E. 529. Admission of incompetent evidence presumed prejudicial. *Fountain v. Wabash R. Co.* (Mo.), 90 S. W. 395; *St. Louis, etc., R. Co. v. Courtney* (Ark.), 92 S. W. 251; *Lane Bros. & Co. v. Bott* (Va.), 52 S. E. 258.

(7) *Johnson v. Atlantic Coast Line R. Co.* (N. Car.), 53 S. E. 862. Improper exclusion of evidence presumed prejudicial. *Inman Bros. v. Dudley and D. Lumber Co.* (C. C. A.), 146 Fed. 449.

(8) *City of Valparaiso v. Spaeth* (Ind.), 76 N. E. 514.

(9) *Houston & T. C. R. Co. v. Thompson*, 16 Tex. Ct. Rep. 888, 97 S. W. 106.

(10) *Galveston, etc., R. Co. v. Parish* (Tex.), 93 S. W. 682; *Southern R. Co. v. Forgey* (Va.), 54 S. E. 477; *Smith v. Perham* (Mont.), 83 Pac. 492; *Ferrell v. Ellis*, 129 Iowa, 614; *American Tobacco Co. v. Polisco* (Va.), 52 S. E. 563; *Fothergill v. Fothergill*, 129 Iowa, 93.

(11) *Bank of Havilock v. Western Union Tel. Co.*, 141 Fed. 522 (C. C. A.).

(12) *Central Trust Co. v. Culver* (Colo.), 83 Pac. 1064.

(13) *St. Louis, etc., R. Co. v. Courtney* (Ark.), 92 S. W. 251.

The statutes everywhere prescribe the method of obtaining a new trial, and specify the grounds therefor, and also provide what steps must be taken in order to perfect an appeal. Many cases go off on technical ground, in the appellate courts, because such statutory requirements have been ignored by counsel in the case, although there may be a crying demand for the consideration of the case on the merits, and then uninformed and unthinking persons set up a howl against the "technicalities of the law." The whole procedure is, of course, of a technical nature, and unless its own prescribed rules were abided by, where would it all lead to? The court has simply no right or jurisdiction to consider a case which does not come before it by virtue of the statute, and in pursuance of the taking of the statutory steps. And it is much the same with the trial of cases in the first place. A trial in which the rules of law (itself but a rule) have not been followed is a mistrial—is no trial at all. A judgment should be, and is the highest evidence of what is the truth concerning the matter in issue. Can it properly be based and rendered upon the antithesis of truth—error.

There is too much delay in the administration of law. It is not implied that a great deal of this is not due to an undue toleration of dilatory tactics. If courts were not so far behind, such moves, like the weird Sisters in Macbeth, would soon vanish into thin air. There is seldom any merit in these tactics. Courts favor certain lawyers with a speedy disposition of their business, and then, again, with delays, according to the exigencies of their business. Clearly, such troubles cannot be reached by remedial legislation. What we need is more judges, and those honest. Sometimes district judges have failed or refused to dispose of pressing court business because it was claimed to be a season in which jurors could not, without inconvenience, remain in attendance upon the court—having pressing work or business matters at home. To adjust the public necessities of the court

business to the convenience of jurors in this way does not even lie within the proper discretion of the judge, but relief against such a course can only be had by mandamus attended with great difficulty—and in the end, as great delay to litigants.

The above statute, in its sphere virtually repudiates the wisdom, experience and settled course of a thousand years. It is an attempt to remedy wrongs, by curtailing and taking away rights. The trouble is due, in part, to the fact that the court machinery is over-worked, and in part to the malfeasance of those charged with the administration of law—to the abuse of discretion for the benefit of favorites. To attempt to mend this by taking away well-established and vital portions of the law is like burning the ship to get rid of the cockroaches.

GEO. W. & M. C. FREERKS.

Wichita, Kan.

INSURANCE—NOTICE OF CANCELLATION.

TAYLOR v. INSURANCE CO. OF NORTH AMERICA.

Supreme Court of Oklahoma.

The return of the unearned premium is essential to a cancellation by the company, where the policy, among other things, provides, "when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

WILLIAMS, J.: The agent of the company, in whose possession the insured left the policy upon which this action was based, was named Comer. On September 26, 1904, Comer met Taylor on the streets of Claremore and said to him: "The insurance company has canceled your policy on your hay." Taylor asked him on what ground, and the agent said: "They did not state." Taylor then said: "Where is my money?" or "How about my money I have paid them, if they have canceled it? How about my money?" And the agent said: "They did not say anything about it." Taylor rejoined: "I guess I can get my money then, if they have canceled it." The agent, Comer, testified that he canceled the policy on September 26, 1904,

and on that day returned the same to the company.

It is the contention of counsel for plaintiff in error that the company, under the terms of this policy, could not cancel it except that it at some time tendered or returned to him the unearned premium in accordance with what he argues are its terms, and on account of the fact that this unearned premium was neither returned nor tendered prior to October 9, 1904, that this had the effect of keeping alive the policy and rendering the company liable for the loss. The paragraph of the policy relating to cancellation is what is commonly known as the "New York standard form," and reads as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium." The construction of this contract is necessary in order to determine whether or not the policy is canceled. If the construction contended for by the defendant in error is correct, the clause was intended to read as follows: "If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the earned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice (on surrender of this policy), it shall retain only the pro rata premium." Without the interpolation of the words "on surrender of this policy" in the last clause, there is an ambiguity, and there is equal reason for the following interpretation: "If this policy shall be canceled (at any time at the request of the insured), or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of the policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

When the policy is canceled by giving "five days' notice of such cancellation," the company retaining "only the pro rata premium," this cannot be accomplished without a tender, unless the words "on surrender of the policy" are read into said clause; and if that was the intention, why repeat the words "by giving notice?" If that contention is correct, it should

should have been stated as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company, * * * it shall retain only the pro rata premium." To say the least, the cancellation clause is ambiguous, and when we consider that the insurer was skilled, not only in the framing, but also the interpretation, of such contracts, and that the insured had no part in the framing thereof, as well as being unskilled in such interpretation, such construction should be adopted as is more favorable to the insured; and especially is this true when the construction contended for by the insurer is not only inequitable, but also unjust.

The contract of insurance here involved, known as the "New York standard policy" was framed by virtue of chapter 488, p. 720, of the laws of New York of 1886, providing for a uniform contract of fire insurance to be used by fire underwriters within said state. The clause here under consideration was first before the Supreme Court of the State of New York in the case of Nitsch v. American Central Insurance Company, 83 Hun, 614, 31 N. Y. Supp. 1131, wherein a tender was construed to be necessary to the cancellation of the policy. The judgment of the Supreme Court was affirmed by the New York Court of Appeals on March 16, 1897 (152 N. Y. 635, 46 N. E. 1149). Afterwards, on March 1, 1898, in the case of Tisdell v. New Hampshire Fire Insurance Company, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765 (see, also, Id. 11 Misc. Rep. 20, 32 N. Y. Supp. 166), it was again held that a tender was a condition precedent to the cancellation of such a policy—the opinion being delivered by Mr. Justice Bartlett, concurred in by Justices Haight, Martin and Vann, and Chief Justice Parker and Mr. Justice O'Brien dissenting, and Mr. Justice Gay being absent. Again, in the case of Buckley v. Insurance Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889 (see, also Id., 112 App. Div. 451, 98 N. Y. Supp. 622), the Court of Appeals, following the Nitsch and Tisdell cases, said: "It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the standard policy. The situation is not a complicated one, and the court desires to so construe the clause that its meaning may be made clear. If the insurance company desires to cancel, it must, as we have held in the

cases cited, not only give the notice required, but accompany it by the payment or tender of the pro rata amount of the unearned premium. It cannot legally demand of the insured the surrender of the policy and its cancellation until this is done." The court was unanimous as to the foregoing conclusion. At that time Chief Justice Cullen, and Justices O'Brien, Haight, Hiscock, Bartlett, Chase and Vann comprised the court.

In the case of Philadelphia Linen Co. v. Manhattan Fire Insur. Co., 8 Pa. Dist. R. 261, that court, after referring to the Tisdell case, said: "The question which is now before us was then passed upon by the Supreme Court of New York upon a policy where the language was identically the same as that which has been quoted from the defendant's policy. The majority of the court in that case decided that, upon cancellation of the policy by the company, it must return or tender the unearned premium in order to effect a cancellation. The same conclusion seems to have been arrived at by the same court in an earlier case, Nitsch v. American Cent. Ins. Co., reported in 152 N. Y. 635, 46 N. E. 1149. While these decisions are not binding upon the courts of Pennsylvania, they are, of course, entitled to great respect. It is, no doubt, eminently proper to hold companies and corporations, such as insurance companies, to a strict construction of their rights as defined in formal contracts, which are prepared in their own interest and the terms of which the insured, as a rule, has little or no part in determining. This has been the policy of the courts, and has been found by experience to be necessary in order to guard the interests of those who are in many cases ignorant, and in all cases more or less at the mercy of such corporations. The courts of this state have been moved by the same policy, and it may be, and we are inclined to think, that the attitude which has been taken by our own Supreme Court with reference to provisions not identical with, but similar to, those in question, requires us to follow the ruling which has been made in the state of New York."

In the case of Gosch v. Firemen's Insurance Co., 33 Pa. Super. Ct. 496, the court said: "The plaintiff, then, having paid the premium for the entire term, could the defendant, at its own pleasure, effect a complete extinguishment of the insurance contract, merely by giving notice of its determination to cancel, without at the same time returning or tendering the unearned portion of that premium? Where a contract with mutual undertaking has been entered into by two parties and fully performed by one of them, we may certainly say, speaking generally, that the other party could not

successfully invoke the aid of any court in an effort to rescind until he had returned or tendered the return of any valuable thing he had received to retain the benefits and at the same time repudiate the burdens of his own agreement would be highly unconscionable and shocking to our sense of natural justice. It would be out of harmony with some of the fundamental principles on which our entire system of jurisprudence is built. Of course, where the right to cancel has been expressly reserved, in the contract itself, then the extent of the right and the conditions upon which it may be exercised must be determined by a reference to the contract, rather than to principles of general law. Turning, then, to the language of the agreement, in which the parties have undertaken to state their respective rights and duties, if we find it susceptible of two constructions, one in harmony with, the other in opposition to those general principles already referred to, a sound discretion would seem to invite us to accept the former and reject the latter, just as, in ascertaining the true meaning of a doubtful clause in a will, the courts incline to that construction which would vest the estate, rather than leave it contingent, which would give the inheritance to the heir rather than to a stranger. Taking up, then, the provision of the policy on this subject, and looking at it as a whole, we may confidently say that it contemplates a complete and effective destruction of the contractual relation at the instance of either party, and that to accomplish his end the party moving must do two distinct and separate things; the object in view undeniably being that, when the cancellation shall have been completed, both parties will have been restored, as far as possible, to the conditions existing before the contractual relation began. If the destruction of this relation be begun by the assured, he must give notice to the other party and surrender his policy, which proclaims the existence of the relation he would now destroy. If begun by the company, it must also give notice and repay or tender payment of the unearned premium in its hands. The right reserved to each party is but a single one, viz., the right to cancel; and the cancellation contemplated is not a partial, but a complete one. The obligation imposed on the party moving to cancel is, looking broadly at the entire contract provision, also single, viz., the restoration of the other party, as far as may be, to the situation occupied before the contractual relation began. True, this involves the performance or tender of performance of another act besides the giving of notice; but it does not necessarily follow that such performance or tender may be totally dissevered in time from, and thus rendered

wholly independent of, the giving of the notice. Such a construction of the policy provision, although strongly urged on us by the learned counsel for appellant, is, at best, a doubtful one. More than this he can hardly claim for it, in the light of the fact that it has been deliberately rejected by the courts of last resort of most of our sister states. The argument supporting it, as he agrees, has been stated, as forcibly as it can be, in the dissenting opinion of Chief Justice Parker in *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. An examination of this opinion seems to show that its conclusions are reached rather from a critical analysis of some of the language of the policy provision and the order in which its sentences are collated than from a broad view of the entire provision and a consideration of the nature of the object to be accomplished thereby. The following language from the majority opinion clearly indicates that the question must now be considered as settled in that jurisdiction: "The question presented on this appeal is no longer an open one in this court. It was decided in *Nitsch v. American Central Ins. Co.*, 162 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion. In that case, as in this one, the question presented was whether the provision of the New York standard policy of fire insurance relating to the cancellation of a policy at the instance of the company requires that, in addition to giving the five days' notice, the company must return or tender the unearned premium in order to effect a cancellation? The answer was in the affirmative. In an elaborate discussion of the whole subject, to be found in Cooley's *Brief's of Insurance*, wherein all of the cases from the various jurisdictions are cited and considered, the general rule to be drawn from them is thus stated on page 2801: The general rule is that under such a provision, unless waived, the repayment of such proportion of the premium is essential to a valid cancellation, and notice without such repayment or a tender of the amount is ineffectual. * * * There must be an actual repayment or tender; a mere promise to pay, a request to call for the amount due, or notice that the money is subject to insured's order, being insufficient."

In 33 Pa. Super. Ct. 505, the court further said: "But we cannot regard the question as an open one, because we believe it to have been ruled in the case of *Baldwin v. Penna. Fire Ins. Co.*, 206 Pa. 248, 55 Atl. 970. In that case, the suit being on a policy similar to the one now under consideration, the company in its affidavit of defense set up 'that the policy in suit had been surrendered and returned for cancellation, and actually

had been canceled on December 8, 1897.' We have not the record actually before us, but take this statement from the paper book of the appellant, which we have carefully examined. The trial court held that the contract of insurance had never been completed, and the policy had never gone into force, and on this ground non-suited the plaintiff. This court affirmed the judgment for the same reason. But the Supreme Court held that the contract had been fully completed, and therefore the policy was in force at the time of the fire, unless it had been canceled meantime, as the company had alleged. As the case was sent back to be retried, the court could not well avoid dispensing of this important defense, set up by the averment of the affidavit quoted, and we think they did it in no uncertain manner. Speaking for the court, Mr. Justice Dean, after pointing out the character of evidence necessary to show a cancellation at the instance of the insured, turns to the question now before us and says: 'The company gave no notice of its intention to cancel as required by the contract, nor did it return nor offer to return five-sixths of the premium, a preliminary to cancellation as the contract required. We can take no other view of the evidence than that the contract of indemnity was complete when Hatfield and the agent both agreed to it, and the agent, by consent of Hatfield, retained for the company the unearned premium. Was the contract afterwards rescinded or cancelled by the company, or by consent of Foster, the attorney (for the insured)? The company could cancel it just one way at any time. That was by five days' notice to the representative of the estate of its intention to do so and return five-sixths of the premium. It gave no notice and offered to return no premium.' We are earnestly urged by the learned counsel for the appellant to regard this clear and emphatic statement of the law, upon the very point now under consideration, as merely dictum; but we are wholly unable to do so, in the light of the fact that the cancellation of the policy was a defense distinctly raised by the pleadings, and the further fact that in the judgment entered, in which the entire court concurred, we find the following: 'On a retrial it is directed that the law be announced as we have indicated.' etc."

In the case of Continental Ins. Co. v. Daniel, 78 S. W. 866, 25 Ky. Law Rep. 1501, the court said: "The difference between the contentions of appellant and appellee is this: The appellant contends that the notice and tender must be given and made five days preceding the cancellation, which takes effect immediately. The appellee contends that the act of

cancellation should take place, and notice and tender be given and made, and five days after this the cancellation takes effect, and the policy is then no longer in force. The lower court took appellee's view of the matter, and we are not prepared to say that the court erred. This provision of the policy is somewhat ambiguous. This court has repeatedly decided in such cases that the policy should be construed most strongly against the company, as it prepared it. This language of the policy seems to support the construction contended for by appellee, to-wit: 'This policy shall be canceled at any time * * * by the company by giving five days' notice of such cancellation. * * *' This seems to imply that the act of cancellation precedes the notice; but the cancellation is not to take effect until five days after the giving of the notice of the cancellation and the tender of the premium."

In the case of Chrisman & Sawyer Banking Co. v. Hartford Fire Insurance Co., 75 Mo. App. 310, that court said:

"In the rescission of a contract by one party, it is a necessary condition precedent to such rescission to place the other party in *statu quo*—to restore to him whatever may belong to him by reason of bringing the contract to an end. This is the general rule, as applied to all cases of contract. And within this rule it has been repeatedly held that before an insurance company can make an effective cancellation it must return or tender the unearned premium. * * * In this case no attempt was made to do so. No effort was made to ascertain what the unearned premium was, and certainly it will not be pretended that the president of the woolen mill released his claim for that. But it is said that this particular policy provided that the unearned premium was to be returned 'on the surrender of the policy.' And, as the policy was not surrendered, it was not necessary to return the premium. We think the return of the premium and the surrender of the policy, under the terms of the contract, were concurrent acts; that neither could be demanded without the other. But, as defendant was the party seeking cancellation, it was its duty first to have tendered the unearned premium on a surrender of the policy. It then would have done all that the contract required it to do in order to place the assured in *statu quo*."

In the case of Hartford Fire Insurance Co. v. Cameron, 18 Tex. Civ. App. 237, 45 S. W. 158, the court said: "We think that the cancellation clause, taken as a whole, means that, when the company elects to cancel the policy, it must, upon giving notice of such intention, at the same time return or tender to the insured or his agent the unearned portion of the

premium. The latter part of the clause, by providing that the company, in such cases, 'shall retain only the pro rata premium,' clearly implies that the other portion shall be returned; and, while it does not in turn declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based. It would be equally as unjust and inequitable to require the insured 'to dance attendance at the place of business of an insurance company, and await their pleasure,' and probably be put to his action to recover the little sum due him, the cost of which might be greater than the sum due."

In the case of Hartford Fire Ins. Co. v. McKenzie, 70 Ill. App. 615, the court for the Second district, in construing an identical contract, said: "Where the company seeks to cancel the contract under such stipulation as is above set out, the insured does not have to tender his policy, in order to entitle him to receive back the unearned premium; but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected." See, also, Peterson v. Hartford Fire Ins. Co., 87 Ill. App. 567; Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321; Williamson v. Warfield-Pratt-Howell Co., 136 Ill. App. 168; Mississippi Valley Ins. Co. v. Bermond, 45 Ill. App. 22; Hamburg-Bremen Fire Ins. Co. v. Browning, 102 Va. 890, 48 S. E. 2; 2 Clement on Insurance, p. 405.

In the case of Mississippi Fire Ass'n v. Dobbins, 81 Miss. 630, 33 South. 506, the same character of contract is construed, and the court, going further, hold that, even in case the contract becomes void, before the company can defend, it must tender and pay over to the insured the unearned portion of the premium.

The authorities holding to the contrary are as follows: Schwartzchild & Sulzberger Company v. Phoenix Insurance Company of Hartford, 124 Fed. 52, 59 C. C. A. 572; Id. (C. C.) 115 Fed. 653; El Paso Reduction Company v. Hartford Insurance Company (C. C.), 121 Fed. 937; Davidson v. German Insurance Company, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884; Insurance Company v. Brechelsen, 50 Ohio St. 542, 35 N. E. 53; Newark Fire Insurance Company v. Sammons et al., 11 Ill. App. 230.

Such policy being framed by virtue of the laws of New York, and the highest court of that state having interpreted same, such construction should be of most persuasive influence, if not binding with us, especially when supported by the weight of authority. Equitable Life Assur. Soc. v. Brown, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682. Hence we hold

that the policy was not canceled; no tender having been timely made.

2. It is further insisted that the assured consented as a matter of law that the contract of insurance should be canceled. We do not so conclude from the evidence. Hartford Fire Ins. Co. v. Tewes, 132 Ill. App. 321.

3. As to the question of forfeiture on account of the alleged incumbrance, that was a question for the jury; there being a conflict in the evidence thereon. The fact that a mortgage may have been made thereon and filed of record, and not canceled of record, was not conclusive. It was competent to show the mortgage security had been changed or substituted, or that the debt had been extinguished by renewal and taking other security or payment. All these questions were for the determination of the jury.

The case is reversed and remanded, with instructions to grant a new trial.

Kane, C. J., and Turner, J., concur. Dunn and Hayes, JJ., dissent.

Note.—Necessity of Tender of Unearned Premium in Cancellation of Standard Policies.—We noticed some cases in 69 Cent. L. J. 450, in annotation under the title "Liberality of Construction of Insurance Policy in the Saving of Insurance." The principal case there seemed to us, while conceding such a rule, to have refused, erroneously, to bring the clause there considered within its reach. In the principal case here the error appears to be in tipping the beam to the other side. Judge Hayes, with whom concurred Judge Dunn, wrote a very elaborate dissent, and he thus speaks of the authorities the prevailing opinion cites in its support: "They may be logically divided into three parts: First, those in which the holding is dictum; second, those in which the discussion is illogical; and, third, where there is no discussion whatever. The holding in the majority of cases is unalloyed dictum." Discursiveness, so much encouraged by the stenographic pencil, seems to be acquiring such a burden and infusion of driftwood and muddy soil, that clear currents of law and precedent are beginning to be despaired of. Therefore, the old maxim—*melius est petere fontes quam sectari rivulos*—it is better to seek the springs than whip the brooks—needs to be impressed upon our understandings.

Analysis of Terms of the Contract.—But before we proceed, let us see how Judge Hayes states the part of the policy considered by the court and then invite our readers to look at the prevailing opinion and notice the lack of analysis of its terms. Judge Hayes said: "Now let us look at the terms contained in this contract and see if there exists even a remote ambiguity. It naturally divides itself into three parts, which make three separate and distinct provisions for three separate and distinct contingencies. They are as follows: First, 'This policy shall be cancelled at any time at the request of the insured, or by the company, by giving five days' notice of such cancellation.' Second: 'If this policy shall be cancelled as here-

inbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate.' Third: 'Except that, when this policy is cancelled by this company by giving notice, it shall retain only the pro rata premium.' These three sections, read separately or together, carry their own interpretation with them. * * * There is no room, in my mind, for any alleged ambiguity about the paragraph, and it is a strained and unnatural construction, and that only, which can render such simple language, conveying ideas so naturally related and in such normal sequence, indefinite and uncertain."

In addition to what Judge Hayes says, we wish to say a little more specifically, that there is not only such natural interrelation and normal sequence in ideas, but there is a plain exclusiveness in these terms which forbids, absolutely, any necessity of tender accompanying notice of cancellation to make the latter effective. The unearned premium is to be "returned on *surrender* of this policy." Therefore it is not to be returned or offered on the giving of the notice. Obviously there is nothing to be returned, if the premium has not "been actually paid;" but only one way is provided for cancellation, and the principal opinion says there are two ways—one for policies, where the premium has "been actually paid," and another for policies where it has not "been actually paid." We are making liberal draft on the dissenting opinion and will pursue this course by examining the opinions in the cases relied on by the prevailing opinion in the principal case.

Dictum Cases.—The following cases show the driftwood and soil of *dictum* relied on by the majority: In the 70 Ill. App. case it was said in the opinion: "At the time of the fire, no notice had been served upon Mc~~K~~enzie that the Hanover Company had elected to cancel its policy and the unearned premium had not been paid or tendered to him," and: "Nothing had been done by the Hanover Company at the time of the fire toward cancellation, their letter to their own agent telling him they desired to cancel was not a compliance with any part of the stipulations relating to cancellation."

In the 136 Ill. App. case it was said: "The question is academic in this case." The 87 Ill. App. case was like that in 70 id. In 132 id. there was no notice given. In 45 id. the company's notice without return of premium was held effective, because no premium had been paid at all. This justifies our comment of there being two forms of cancellation under these rulings, when the clause on its face provides only for one.

In the 206 Pa. case it appears that the agent, insisting the policy was properly made out, and the attorney for insured that it was not, the agent asked him if he wanted it cancelled. He said no. The court said: "The company gave no notice of its intention to cancel the policy as required by the contract," and then seemingly as an afterthought it was said: "Nor did it return or offer to return five-sixths of the premium, a preliminary to cancellation as the contract required."

In the 102 Va. case the cancellation notice told insured he could obtain the unearned premium by surrender of the policy. "This he never did, and for six months before the fire, in absolute

silence, acquiesced in the terms of cancellation." There the court said: "If this technical position could prevail," the policy was found to have lapsed for other reasons. That case, instead of supporting by *dictum* the majority opinion, seems the other way.

The 81 Miss. case shows that not even was there any notice given, but it was claimed the premium was accepted after the fire and no objection was made even on that account, but because there was other insurance. Everything said about cancellation and return of premium was beside the question. The opinion is very brief and seems a model in its allusion to nothing really involved in the case.

The 75 Mo. App. case shows the company wrote to the agent to cancel the policy and agent wrote asking it to continue the policy, and it wrote back to him refusing to do so. Agent told insured, and insured asked that the agent make further efforts. He replied it was useless and he would have to cancel the policy. The court said: "The assured must be informed, not that the policy *will* be cancelled, but that it *is* cancelled." Then it is recited the fire occurred the next day, and five days' notice was necessary. Further on the court expressed the view that: "Return of the premium and the surrender of the policy were concurrent acts." This case seems to us, if *dictum* is to be considered, as against the majority view.

Thus we see that the Oklahoma Supreme Court gives additional illustration and example of a fault, which in decision writing has become painfully common. It puts its *imprimatur* on *dictum* as authority, when proper treatment of the first offender in that particular would be mild "in passing the imperfection by." These *dicta* have large currency given to them by court reporters. These gentlemen are selected to the places they hold upon the supposition that they are not merely members of the bar, but that they are lawyers in the stricter sense of that term. They are supposed to state in the headnotes they prepare the points decided, as involved in the cases they report, but we are of the impression that they put *dicta* in headnotes with indiscriminating liberality and to utter confusion. Any journeyman printer can do this much. But, if a court reporter cannot discern *dicta* from decision, he is something like a square peg in a round hole.

Cases in Point.—But let us look at some of the cases relied on, which did involve the question in the principal case. In the Cameron case, in 18 Tex. Civ. App. 237, there is no analyzing of the terms of the contract—or scarcely any. It says: "While it does not declare when the return shall be made, it would be unreasonable and unjust to allow it to cancel its obligation and retain the consideration upon which it was based." We think it does declare that it is to be returned upon surrender of the policy. The entire discussion in this case covers about fifteen lines and is based or purports to be based, on very few cases.

The Grosch case in 33 Pa. Super. Court, 496, is a fairly good discussion, except that it in part is a *petitio principii*, or begging of the question, in saying that the provision of the policy, looking at it as a whole, contemplates "a complete and effective destruction of the contractual relation at the instance of either party; and that to ac-

complish that end, the party moving must do two distinct and separate things." We think that statement is misleading in that it appears to say these distinct and separate things must, without the intervention of any act by the other party, be concurrent. We think the contract provides where the company acts that it shall give notice, and then the other party shall act and then, in its turn the first party. Otherwise there is to be surrender of the policy only when the insured moves. But, if such surrender is important in one case, why not the other? The opinion then asserts that the opposing contention has been "rejected by most of the courts of our sister states." It cites New York cases, 75 Mo. App. and 26 Pa. *supra*, the last two shown by us to be *dictum* cases.

The Tisdell case was, as shown in the majority opinion, and there was a dissent as stated, and this concurred in by O'Brien, J. and, one judge being absent, there was four for affirmance, these four claiming that the Nitsch case left the question no longer open in that court. Parker, C. J., said of the Nitsch case, in this dissent, that: "There was another ground upon which the affirmance of the judgment was required at the general term and in this court, namely, that after the insured had received the five days' notice of cancellation, he addressed to the corporation a letter of inquiry about it and received such a reply as constituted waiver of the notice which had just been sent out by the general agent, and thus it happened that the judgment of the circuit court rested upon a sure foundation and required affirmance." So even in New York it looks somewhat like the doctrine there started out with its basis on a *dictum*, and this is carried down to the Buckley case in 188 N. Y. 390, which also fails to discuss the question.

Opposing Cases.—19 Cyc. 644 says: "It is held by better authority, that after the expiration of the five day notice required in case the cancellation is by the company, the insurance is deemed to be terminated and inoperative," and there is cited for this Vance on Insurance, § 183; Richards on Insurance (3d Ed.), § 288, and a number of cases.

In Parsons & Albaugh v. Ins. Co., 133 Iowa 532, where insured requested cancellation, surrendering at the same time his policy, it was said: "The request is all that is essential to a cancellation, but the policy must be surrendered to secure the return of the unearned premium. The design of the paragraph was to enable one party to the contract to cancel it without the consent of the other, and, to this end, precisely what was necessary to accomplish this result was prescribed." This observation may be classed as obiter also in a case where the company is cancelling, but it plainly shows the court's mind. All that is said about the company not having the right to "hamper" insured in cancellation is appropriate when turned around when the company is trying to cancel.

In Davidson v. Ins. Co., 74 N. J. L. 487, 13 L. R. A. (N. S.) 884, the dissenting opinion of Ch. J. Parker is quoted at length and approved. The note to this case in 13 L. R. A. (N. S.), *supra*, gives the cases pro and con and among them we notice what we have called the *dictum* cases. If those are omitted it is difficult to say on which side the preponderance in number

of cases lies. It is quite evident, however, that dicta have played a part in this matter they should not have been allowed to play, and with all the reforms that have been discussed, one that should be eliminated is that.

The ever surging flood of legal literature would be profitably abated, if judges would avoid these things as far as possible in their opinions, and reporters and digest makers would cease stationing these wills-of-the-wisp in our marshy wilderness of precedent. We can scarcely conceive how any one would ever contend for such a meaning in any other than an insurance contract. And to say it is correct as to that approaches very nearly to saying, that an insurance company cannot formulate any sure provision for forfeiture upon notice. C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Criminal Law—Habitual Criminal—Trial of.—Where a person who is charged under section 10 of the Prevention of Crime Act, 1908, pleads guilty of the "crime," but not guilty to being a habitual criminal, the jury may be sworn as if to try a misdemeanor whether the original crime be a felony or a misdemeanor. But if the crime to which he has pleaded guilty be a felony there is no objection to the jury being sworn as if to try a felony.—*Rex v. Turner*, Court Cr. App., 54 Sol. Journal, 164.

Criminal Law—Indemnification of Bail—Conspiracy—Misdemeanor.—An agreement between A., an accused person, and B., that if B. will go bail for A. he shall be indemnified against loss if the bail is forfeited, is not only an illegal contract in the sense that it cannot be enforced in a civil court, but it is also a conspiracy and an indictable misdemeanor as tending to produce public mischief.

If these facts are found the offense is complete, and the court need not put a further question to the jury as to whether these facts tended to produce public mischief.—*R. v. Brailsford* (1905), 69 J. P. 370 (1905) 2. K. B. 730, followed. Court of Criminal Appeal, 74 id. 41.

Ecclesiastical Law—Repulsion from Holy Communion—Lawful Cause—Open and Notorious Evil Liver—Marriage with Deceased Wife's Sister.—A. N. Banister was a baptized and confirmed lay member of the Church of England and a parishioner of the parish of Eaton in the diocese of Norwich. On the 12th of August, 1907, Mr. Banister, being then a widower, went through the form of marriage in Canada with his deceased wife's sister, also a baptized and confirmed member of the Church of England. This marriage was valid by the law of Canada, but invalid by the law of England until the 28th of August, 1907, the date of the passing of the Deceased Wife's Sister Marriage Act, 1907, when it became valid as a civil contract. By section 1 of that Act, "No marriage heretofore or hereafter contracted between a man and his deceased wife's sister, within the realm or without, shall be deemed to have been or shall be void or voidable, as a civil contract, by reason

only of such affinity: Provided always that no clergyman in holy orders of the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office to which suit, penalty, or censure he would not have been liable if this act had not passed.'

In October, 1907, the vicar of the parish church of Eton refused to admit Mr. and Mrs. Banister to Holy Communion, whereupon they promoted a criminal suit against him.

By 1 Edw. 6, c. 1, s. 8, it was provided that the minister should not without lawful cause deny the sacrament to any person who should devoutly and humbly desire it, and by the notice prefixed to the Order of the Holy Communion in the Prayer Book, a minister was permitted to repel from the Lord's Table "an open and notorious evil liver so that the congregation be thereby offended."

The criminal suit was heard in the Archers Court of Canterbury, and, by the decree of the court, the vicar was admonished for having repelled the promoters from the Holy Communion and was admonished to refrain from similar acts in future.

The vicar having obtained a rule nisi for a prohibition to restrain further proceedings in the matter of this decree and monition, the rule was discharged by the divisional court (Bray, J., dissenting).

The Vicar appealed.

The court held that the effect of section 1 of the Act of 1907, was to legalize a marriage with a deceased wife's sister for all purposes and by implication to repeal so much of the statutes of Henry 8 as included a deceased wife's sister within the prohibited degrees; that the proviso in the section was confined to the foregoing substantive enactment of which it was a qualification, and that the only effect of it was to relieve clergymen from liability for refusing to officiate at or aid in any way the performance of such marriages; and that persons who married according to the law of England and who might also have had that marriage solemnized in church could not on that account be treated as notorious evil-livers, or as giving the congregation any ground of offence against them.

Appeal dismissed.—*Rex v. Banister*, Court of Appeal, 74 London Justice Peace 3.

Joint Stock Company—Lotteries Act.—By section 41 of the Lotteries Act, 1823, a person guilty of certain offenses against the act is to be deemed a rogue and vagabond, and to be punished as thereafter directed. By section 67 the punishment is imprisonment, and for a second offense imprisonment and whipping. Under section 4 of the Summary Jurisdiction Act, 1879, a fine may be imposed instead of imprisonment if the justice of the case will be better met by so doing. By section 2 (1) of the Interpretation Act, 1889, "in the construction of every enactment relating to an offense punishable on indictment or on summary conviction * * * the expression 'person' shall, unless the contrary intention appears, include a body corporate." But the contrary intention sufficiently appears in the sections of the Lotteries Act quoted above, and an incorporated joint stock company cannot be punished in any way under those sections.—*Hawke v. E. Hulton & Co. (Limited)*, (K. B. Div. Ct., March 30), (1909, 2 K. B. 93), 54 Sol. Journal, 162.

Workmen's Compensation Act, 1906—Accident Happening Abroad.—Under the Workmen's Compensation Act, 1906, the dependant of a workman who is killed may have a claim to compensation. That claim is a statutory claim, and wholly independent of contract. Therefore, when a workman is killed beyond the territorial limits of the United Kingdom his dependants have a statutory right to compensation or none at all. But (a) *prima facie* no statute is intended to operate outside the United Kingdom (see Maxwell on the Interpretation of Statutes, p. 213); (b) the act expressly provides (section 7) for the dependants of seamen and apprentices (and not any others) who may be fatally injured elsewhere; and therefore the widow of an English fitter who was killed at Malta by an accident arising out of his employment by an English company cannot recover compensation under the act.—*Tomalin v. S. Pearson & Son (Limited)*, (C. A. March 30), (1909, 2 K. B. 61).

ENGLISH NOTES.

From London Solicitors' Journal we find something on administration of oaths, which is more or less exemplified in American practice:

The form of the new oath, and the method of administering it, which have been sanctioned by the Lord Chief Justice for use in the courts of the King's Bench division, are given in a letter by Mr. F. A. Stringer to the Times, and are reproduced elsewhere, and no doubt will be generally adopted. As Mr. Stringer usefully points out, there are now really three distinct and concurrent forms of oath: (a) the established ordinary (new) form of oath, which every person administering an oath for any purpose whatever is bound to use unless the person about to be sworn voluntarily objects, and desires some other form; (b) the Scottish form of oath, which must be administered without question to every person who so desires to be sworn (Oaths Act, 1888, section 5); and (c) the statutory right of every person sworn for any purpose whatever to be sworn in any form and manner which he may choose and define, and which he declares to be binding on his conscience (1 & 2 Vict. c. 105).

From this same Journal we excerpt the following:

The House of Lords delivered judgment on the 21st ult. in the case of *Amalgamated Society of Railway Servants v. Osborne* (Times, December 22nd), and held, affirming the court of appeal, that the respondent (plaintiff) was entitled to succeed in his action, and that the application of the trade union's funds towards payment of members of Parliament was illegal, and must be restrained. The payments had been made under rules of the trade union, which provided for the establishment of a fund "for the maintenance of Parliamentary representation," the important clause being as follows: "All candidates shall sign and accept the conditions of the Labor party, and be subject to their whip;" "the executive committee shall make suitable provision for the registration of a constituency represented by a member or members, who may be candidates responsible to and paid by this society." It was argued that

these rules were ultra vires of the appellants' powers as conferred by the Trade Union Acts, and that whether ultra vires or not, they were illegal as being against public policy and opposed to the spirit of the constitution. These two arguments may be called the "ultra vires" argument, and the "constitutional" argument. The appeal was heard by Lord Halsbury, Lord Macnaghten, Lord James, Lord Atkinson and Lord Shaw, and the decision of the House, in favor of the respondent, was unanimous, although the reasons for the decision differed. Lords Halsbury, Macnaghten and Atkinson relied on the ultra vires argument. Lord James, who delivered the shortest of the five judgments, would have supported the appellants' case but for the stringent terms of the rule, which required candidates to "sign and accept the conditions of the Labor party and be subject to their Whip." This, he thought, might compel a member of Parliament to forego his own judgment on matters not directly connected with the interests of labor. He was therefore of opinion that "the application of money to the maintenance of a member whose action is so regulated, is not within the powers of a trade union." Lords Macnaghten, James and Atkinson all expressly stated that they thought it unnecessary to refer to the "constitutional" argument. Lord Shaw, however, whose judgment is the lengthiest of the five, was so far doubtful as to the right of the respondent to succeed on the ultra vires argument, that he felt compelled to deal with the "constitutional" question, and founded his opinion on that argument entirely.

Anent President Taft's suggestions about injunctions without notice and the abuse thereof needing a statute for their brief operation, the London Solicitors' Journal comments as follows:

"The object of this legislation is, no doubt, to prevent the abuse of the power to grant injunctions. It is unnecessary to say that no such enactments are required in this country, where the judges may be trusted to exercise their preventive jurisdiction without being too closely fettered by the precise language of sections or rules."

JETSAM AND FLOTSAM.

THE STUDENTS' BOX IN ENGLAND.

When Lord Kenyon was Chief Justice of England there used to be a box for the bar students close to the bench, and Lord Campbell says he well remembers how the Chief Justice would show the pleadings to the students and explain their effect. Mr. Justice Jelf has found occasion at Birmingham to express a wish that the students' box were restored in the London courts and introduced into the Assize courts. The practice of reserving a special place for the use of students in our courts of justice was, of course, in existence long before Kenyon's time. Lord Mansfield was always at great pains to state cases for the benefit of students. "There wants nothing to answer the objection but to state the case, which I will do for the sake of the students," are among the words of his reported judgment in a case tried in 1765. An older reference to the practice may be found in Burnet's "History of My Own Time," published in

1682, in which the observant author says: "The judges were wont formerly, in delivering their opinions, to make long arguments, in which they set forth the grounds of law on which they went, which were great instructions to the students and barristers." He would be a bold person who, in these days, when so much is heard of the law's delays, recommended that judges should indulge in "long arguments" for the benefit of students, but nobody can doubt that the students' box might again play a most useful part in the scheme of legal education. It often happens that when an important case is being tried the demands upon the space of the court are so heavy that a student is prevented from enjoying the wished-for opportunity of observing how the masters of the forensic art do their work. The provision of special accommodation for students in the courts would not only enable them to learn the lessons which are to be derived from the combats of the foremost men at the bar in causes celebres, but would also encourage them to make a systematic use of their opportunities of studying the art of advocacy in less sensational cases. The study of abstract propositions of law close packed in text-books and the reading of papers in Chambers are an essential part of the students' training, but an intimate study of the art of advocacy, enabling him to see the legal machinery actually at work, to observe the respective roles in the legal drama played by judge, counsel, solicitor and witness, and to gather the ripe fruit of practical experience, might advantageously be made an integral part of legal education, and nothing is more likely to achieve the desired end than the restoration of the "students' box."—Law Journal (London).

CORRESPONDENCE.

RESPONSIBILITY OF OWNER OF AUTOMOBILE AS A DANGEROUS MACHINE.

Editor Central Law Journal:

In 69 Cent. L. J. 360, there is a discussion of the case of Ingraham against Stockamore, which bears on a case I have in the office. It does not, however, discuss the question whether a man who is running an automobile without a license in violation of a statute, which makes one necessary, can recover if injured through the negligence of another person. This is the exact question which arises in my case and I have found no discussion directly in point, although the Massachusetts case of Dudley against the Street Railway Company, which you cite in the article above referred to is very close. If you know of any decision in which the exact point of my case has been determined, I should be greatly obliged, if you will refer me to it.

Thanking you in advance for this favor. I am
Very truly yours,

JAMES L. DOHERTY.

[Note.—We refer our correspondent to 69 Cent. L. J. 451, where we think he will find what he desires in a communication by one of our correspondents, a highly esteemed and successful practitioner at the St. Louis bar.]

Editor.]

BOOKS RECEIVED.

The American State Reports, Containing the Cases of General Value and Authority Subsequent to those Contained in the "American Decisions" and the "American Reports," decided in the courts of last resort of the several states. Selected, reported and annotated, by A. C. Freeman. Volume 128. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1909. Review will follow.

The American and English Encyclopedia of Law and Practice. Editors, William M. McKinney and David S. Garland. Volume II. Northport, Long Island, N. Y. Edward Thompson Company, London, C. D. Cazenove & Son. 1909. Review will follow.

Report of the Thirty-second Annual Meeting of the American Bar Association, held at Detroit, Mich., August 24, 25, 26 and 27, 1909. Baltimore: The Lord Baltimore Press. 1909.

Report of the twenty-first annual meeting of the Virginia State Bar Association, held at The Homestead Hotel, Hot Springs, Va., August 10th, 11th and 12th, 1909. Volume XXII. Edited by John B. Minor of the Richmond Bar. Richmond, Va. Richmond Press, Ind. Printers, 1909.

HUMOR OF THE LAW.

MARRIAGE ACCOMPLISHED UNDER DIFFICULTIES.

The late Benjamin F. Wade, at the beginning of his career at the bar, was noted for his bashfulness, mistakenly says an exchange; but another trait, his determination, enabled him to get through his work in a way which, though not conventional, landed him at his destination.

Once, while a youth, he started with a bag of corn on his shoulders to a mill twenty miles away. It was in November, and coming to a full-banked river, he discovered that the canoe was on the other side. Throwing off his clothes he plunged in, gained the canoe, took it back where the bag of corn was, which he ferried across, and then went on his way.

Another illustration of his way of doing things occurred while he was a justice of the peace, which we doubt. One day a young couple called at his office to be married. The presence of four or five irreverent young men prompted the bashful justice to suggest privately to the pair that they had better meet him at the little hotel.

They went, and so did the justice, by a round-about way, only to discover that the boys were also there. Seeing that he must perform the ceremony in their presence, he, though he had forgotten the usual formula, proceeded to business in the most direct way.

"You wish to be married?" he asked the pair.

"Yes."

"Stand up and take hands. You," addressing the not prepossessing groom, "wish to marry this young woman?"

"Yes."

"Of course you do!" exclaimed the justice, glancing at the pretty bride, and asking her,

"Do you take this young man for your husband?"

"Yes."

"Well, you are getting the worst of it, but I say you are husband and wife. There, boys, you see I did it!" he concluded, glancing at the spectators.

The couple had to have it explained to them that they were, in the eyes of the law, wedded. Whereupon the husband offered the justice a fee—the statute made it one dollar and a half—which, by a lofty motion of his hand, he waved off, saying, "Nothing for a job like that!"

Affidavit for "Assalt and Baterie." State of Indiana, _____ County, SS.

Before _____, a justice of the peace in said county, State of Indiana.

vs.

Affidavit for Assalt and Baterie.

hoos sristen name Is unnoo
being duly sworn on
oath says; that _____ hoos crissen name
is unnoo, late of said county, on or about the
first day of July, A. D. 1909 at the county of
_____, State of Indiana,
Township, as affant verily believes Did then
and there unlawfully tooch and strike and
Wond one _____ In a Rude and
angry Manner.

second Cont
1 complanes of _____ and
says that the Defendant one the first day of
July, 1909, In a Rude Insolent and angry Man-
ner Unlawfully tuched strok Bete and Wanded
the plaintiff to his Damage \$50.00 Dolers.

contrary to the form of the statutes in such
cases made and provided against the peace and
dignity of the State of Indiana.

Subscribed and sworn to before me this 2 day
of May, 1909.

Justis of the Pease.

Allen Wood, a lawyer of Indianapolis, assisted the Indiana Republican State Committee during the campaign last year. One evening, after making out a route card, he called on some very attractive young ladies who had moved to Indianapolis from the part of the State he was about to invade on a speaking jaunt. He had noticed on the map the name of a town bearing the family name of the young ladies, and, on inquiry from them, learned the town had been named for their father. "Well," said Wood, "I think I had better stop off there and make a speech while in the neighborhood." "It will scarcely be worth your while," replied one. "I don't believe there are thirty people in the whole town. It is merely a cross-roads station. When we moved away a creamery was started in the very house in which we had lived." "How ill considered," exclaimed Wood, "to start a creamery when the peaches were all gone."

The late Judge Silas Bryan, the father of William J. Bryan, once had several hams stolen from his smokehouse. He missed them at once, but said nothing about it to anyone. A few days later a neighbor came to him.

"Say, judge," he said, "I heard yew had some hams stole t'other night."

"Yes," replied the judge very confidentially, "but don't tell anyone. You and I are the only ones who know it."—Success Magazine.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

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1. Acknowledgment — Ground of Impeachment.—While, as between the parties, the certificate of acknowledgment of a deed may be impeached for fraud or collusion, the evidence must be clear and satisfactory, and it cannot be impeached by the grantor's unsupported testimony. *Kosturska v. Bartkiewicz*, Ill., 89 N. E. 657.

2. Adverse Possession—Attornment.—Where a landlord is in adverse possession through a tenant, his possession is not destroyed by the tenant's attornment to a stranger.—*Saxton v. Corbett*, Tex., 122 S. W. 75.

3. Color of Title.—Possession continued by successive grantees inures to the benefit of a subsequent grantee claiming thereunder, and is available to him in establishing a prescriptive title.—*Hassam v. Safford*, Vt., 74 Atl. 197.

4. Statute of Limitations.—The five-year statute of limitation does not protect one claiming under a deed from an individual where he does not show the date of the recording of the deed.—*Haring v. Shelton*, Tex., 122 S. W. 13.

5. Appeal and Error—Review of Facts.—Concurrent findings of fact by two lower courts in support of a claim of a native of the Philippines to have held possession of certain mines down to the bringing of the action will not be disturbed by Supreme Court of the United States on appeal from Supreme Court of the Philippine Islands.—*Reavis v. Fianza*, U. S. S. C., 30 Sup. Ct. 1.

6. Attachment—Intervention by Seller.—The seller, after giving notice of the exercise of his

right of stoppage in transitu, may interplead in attachment proceedings by a creditor of the buyer.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.*, Mo., 122 S. W. 10.

7. Attorney and Client—Authority to Compromise.—An attorney in a divorce action is without authority to compromise by accepting a less amount of alimony than awarded by the decree in satisfaction thereof without express authority of his client, and such a compromise is voidable at the client's option.—*Sebastian v. Rose*, Ky., 122 S. W. 120.

8. Misconduct of Attorney.—It is the duty of complainant's attorney in a divorce case to disclose to the chancellor a prior adjudication dismissing a like bill for want of equity.—*People v. Case*, Ill., 89 N. E. 638.

9. Bankruptcy—Contempt.—Disobedience of referee's order by a bankrupt to justify an order of commitment must be proved beyond a reasonable doubt.—*In re Mize*, U. S. D. C., N. D. Ala., 172 Fed. 945.

10. Discharge.—Creditors who had actual notice of the judication of their debtor in bankruptcy, and in the steps taken in the proceedings, were found to present their claim, though they were not mentioned as creditors, and their claim was barred by the discharge, though never presented.—*Dycus v. Brown*, Ky., 121 S. W. 1010.

11. Discharge.—Where a bankrupt obtained property within four months prior to bankruptcy on the faith of a false financial statement its date was not material to the creditor's right to prevent a discharge.—*In re Terens*, U. S. D. C., E. D. Wis., 172 Fed. 938.

12. Banks and Banking—Dissolution.—A banking corporation may prosecute its suit to final judgment for the purpose of closing up its affairs, though it goes into voluntary liquidation pending the litigation.—*Commercial Loan & Trust Co. v. Mallers*, Ill., 89 N. E. 661.

13. Misapplication of Funds.—Willful misapplication of the funds of a national bank, in order to constitute an offense, must be with intent to injure or defraud the bank or some other person, and is not maladministration.—*United States v. Steinman*, U. S. C. C. of App., Third Circuit, 172 Fed. 913.

14. Benefit Societies—Proofs of Death.—A beneficial insurance order waived its right to insist on proofs of death, as a condition precedent to beginning suit on a certificate, where it refused to receive proofs of death based on absence on which the beneficiary relied.—*Miller v. Sovereign Camp Woodmen of the World*, Wis., 122 N. W. 1126.

15. Bills and Notes—Bona-fide Purchasers.—A failure of the consideration for drafts as between the drawer and drawee would not affect the right of a bona-fide purchaser of the drafts for value before maturity, without notice thereof, to recover thereon against the drawee.—*Smith Bros. v. Flanders*, Tex., 122 S. W. 80.

16. Consideration.—If in an action on a note the pleader unnecessarily alleges a consideration it must be proved.—*Bronston's Adm'r v. Lakes*, Ky., 121 S. W. 1021.

17. Innocent Purchaser.—Where plaintiff was an innocent purchaser for value of drafts given by defendant in payment for goods sold through fraud, but obtained knowledge of the fraud and of defendant's refusal to pay for them before maturity, defendant could set up the fraud as a defense in an action thereon by plaintiff only as to such drafts as matured when plaintiff had in its possession funds of the draw-

er sufficient to pay them.—Johnson County Sav. Bank v. Renfro, Tex., 122 S. W. 37.

18.—Right of Action.—That the payee of a promissory note was also one of the makers would not prevent his maintaining an action at law thereon.—O'Day v. Sanford, Mo., 122 S. W. 3.

19. **Boundaries**.—Evidence.—In a suit involving the location of a boundary line, evidence of adverse possession is competent to show the true location of the line.—Stark v. Duhring, Wis., 122 N. W. 1131.

20.—Possession of Part of Tract.—Where, the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-defined limits of the whole lot.—Washam v. Harrison, Tex., 122 S. W. 52.

21.—Riparian Rights.—The owner of land abutting on the meandered line of a lake has *prima facie* title to the center of the lake.—Johnson & Burr v. Elder, Ark., 121 S. W. 1066.

22. **Burglary**.—What Constitutes.—Pen. Code 1895, art. 841, held to be an addition to articles 848 and 839, and under the three articles burglary is committed by discharging firearms into a house with intent to injure the person therein; the intent not necessarily being to commit a felony.—Ralley v. State, Tex., 121 S. W. 1120.

23. **Cancellation of Instruments**.—Undue Influence.—Allegation that a deed was obtained by fraud will not support a claim that it was executed through undue influence.—Kosturska v. Bartkiewicz, Ill., 89 N. E. 657.

24. **Carriers**.—Live Stock Shipment.—The crowded condition of the stock yards at its terminus held not to excuse a railroad company from liability for negligence in handling a shipment of cattle.—Texas & P. Ry. Co. v. Henson, Tex., 121 S. W. 1127.

25.—Place of Delivery.—A railroad contracting to haul logs held required to deliver the logs in accordance with the custom established prior to the execution of the contract and continued subsequently.—Gates v. Detroit & M. Ry. Co., Mich., 122 N. W. 1078.

26.—Scope of Employee's Authority.—A brakeman on a freight train has at least *prima facie* authority to eject a trespasser so as to make the company liable for his negligence or wantonness in doing so.—Golden v. Northern Pac. Ry. Co., Mont., 104 Pac. 549.

27.—Stoppage in Transitu.—The right of stoppage in transitu is merely an extension of the seller's lien for the payment of the purchase money.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co., Mo., 122 S. W. 10.

28. **Charities**.—Gifts.—In determining whether a gift is charitable, the courts will not look to the donor's motives in making it, but rather to the nature and purpose of the gift.—In re Graves Estate, Ill., 89 N. E. 672.

29. **Constitutional Law**.—Equal Protection.—Where all persons who are in like circumstances are treated under the laws the same, there is no deprivation of the equal protection of the law.—Board of Com'rs of Johnson County v. Johnson, Ind., 89 N. E. 590.

30.—Public Service Corporation.—To compel a public service corporation to discharge its public duties can in no case amount to a taking without due process of law.—Hatch v. Consumers' Co., Idaho, 104 Pac. 670.

31. **Contracts**.—Action for Breach.—A recovery of the fee, under a contract requiring an-

nual prepayment of a membership fee, cannot be had on a count on book account, or on the common counts; but plaintiff should declare specifically on the contract.—Massachusetts Collecting & Rating Agency v. Cerudell, R. I., 74 Atl. 177.

32.—Cancellation.—The doctrine permitting the cancellation of conveyances made in consideration of promises to support and care for the grantors in the future when the grantees fail to perform does not apply to ordinary bargains and business transactions for gain.—Miller v. Sutliff, Ill., 89 N. E. 651.

33.—Conditional Acceptance.—Though plaintiff's acceptance of an offer was conditional, the contract was complete if both parties subsequently treated it as existing in accordance with the acceptance.—General Lithographing & Printing Co. v. Washington Rubber Co., Wash., 104 Pac. 650.

34.—Consideration.—A sale of public land, title to which is in the state, is not a consideration for the promise to pay another therefor.—Samples v. Wever, Tex., 121 S. W. 1129.

35.—Illegality.—The defense of illegality of a contract relied on may be raised by either party thereto, but cannot be invoked by a third person.—Owens v. Davenport, Mont., 104 Pac. 682.

36.—Implied Terms.—The terms of a contract may be express or implied from acts, but there must be in either case a distinct intention common to both parties.—Blake v. Scott, Ark., 121 S. W. 1054.

37.—Limitation in Contract.—The bar of a contract limitation must be specially pleaded the same as the general statute of limitations.—Helmer v. Title Guaranty & Surety Co. of Scranton, Pa., Wash., 104 Pac. 783.

38. **Corporations**.—Contract of Promoters.—Contract of promoters of a corporation formed by consolidation to retain an officer as a paid officer of the new corporation held binding on it until disapproved by its directors.—Girard v. Case Bros. Cutlery Co., Pa., 74 Atl. 201.

39.—Fraud.—Acts of persons in appropriating earnings of a corporation held constructive fraud as to a cestui que trust of one of the persons to whom stock of the corporation had been issued under a decree of court, and who had been directed to pay the cestui que trust's pro rata shares of the earnings of the corporation.—Allen v. Hutcheson, Tex., 121 S. W. 1141.

40.—Subscriptions.—A subscription to stock of a corporation to be formed for the purposes of acquiring and carrying on a "general produce and merchandise business," etc., held not to bind subscribers to take stock in a corporation formed not only for such purposes, but also for dealing in real estate, bonds and mortgages.—Hanford Mercantile Store v. Sowlveere, Cal., 104 Pac. 708.

41.—Torts of Agents.—A corporation is not liable for the slanderous utterance of its servants, unless the actionable words were spoken by its express consent, direction, or authority or were ratified by it.—Duquesne Distributing Co. v. Greenbaum, Ky., 121 S. W. 1026.

42.—Transfer of Stock.—A purchaser of corporate stock, having a property right therein, had the right to demand certificates therefor, which, under the law by agreement, the corporation was required to furnish, and could enforce his right without reference to the lapse of time if no loss or injury had resulted to an innocent

person by reason of delay.—*Cortelyou v. Imperial Land Co.*, 104 Pac. 695.

43. **Courts**—Encroachment on Legislature.—A court held authorized to inquire into the validity of an ordinance of a legislative body when an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen.—*Smith v. City of Centralia*, Wash., 104 Pac. 797.

44. **Covenants**—Breach.—That a grantor of an undivided interest in a deed containing a covenant of warranty acquired his interest after the mortgage under which a remote grantee was evicted had been given held of no consequence in an action for breach of covenant.—*Williams v. O'Donnell*, Pa., 74 Atl. 205.

45.—Discharge.—A contract of warranty contained in a deed of real estate involves a personal obligation on the part of the grantor to which the grantee has a right, and which cannot be denied him or switched to another without his consent.—*Smith v. Pitts*, Tex., 122 S. W. 46.

46. **Criminal Law**—Intoxicating Liquors.—A conviction for selling liquor in violation of a local option law held no bar to a conviction for violating a city ordinance making the unlawful carrying on of a liquor business in a city a nuisance.—*Mayhew v. City of Eugene*, Or., 104 Pac. 727.

47.—New Trial.—Evidence simply of an impeaching character is not such newly discovered evidence as will warrant a new trial.—*Morris v. State*, Tex., 121 S. W. 1112.

48. **Criminal Trial**—Modification of Sentence.—A sentence will be modified on appeal by reversal of the part imposing a cruel and unusual punishment.—*State v. Ross*, Or., 104 Pac. 596.

49. **Damages**—Exemplary Damages.—Exemplary damages cannot be recovered unless the plaintiff sustained actual damages.—*Thuron v. Skirvin*, Tex., 122 S. W. 55.

50.—Married Women.—Where a married woman is a housekeeper, it is not necessary to prove her earning power to entitle her to recover damages for permanent injuries.—*City of Louisville v. Tompkins*, Ky., 122 S. W. 174.

51.—Mental Anguish.—To recover damages under the mental anguish doctrine, it is necessary that the mental anguish suffered be real and with cause.—*Western Union Telegraph Co. v. Archie*, Ark., 121 S. W. 1045.

52.—Right to Recovery.—Where defendant has been guilty of no actionable wrong, no damages can be recovered from him, either compensatory or by way of example.—*Freund v. Murray*, Mont., 104 Pac. 683.

53. **Death**—What Law Governs.—The rights of the parties to an action for wrongful death must be determined in accordance with the law of the state where the injury occurred.—*St. Louis, I. M. & S. Ry. Co. v. Corman*, Ark., 122 S. W. 116.

54. **Deeds**—Construction.—The words "children" and "issue" in a deed are not to be given the meaning of "heirs," when to do so would defeat the lawful intention of the grantor.—*Hopkins v. Hopkins*, Tex., 122 S. W. 15.

55.—Construction.—Where the conduct of the grantor indicates that he intended to give effect to the deed and to relinquish all control of it, the law will give it effect accordingly, and will hold that there has been a delivery.—*McComb v. McComb*, Ill., 89 N. E. 714.

56.—Delivery.—A transfer of a fee-simple estate, subject to a life estate in the grantor, held effected by a deed delivered by the grantor to a third person, with instructions to deliver it to the grantee at the grantor's death.—*Moore v. Trott*, Cal., 104 Pac. 578.

57. **Descent and Distribution**—Rights of Expectant Heirs.—There is no rule of law which requires a parent to distribute property equally among his children; but he may prefer one and cut off another with or without any reason.—*McLaughlin v. McLaughlin*, Ill., 89 N. E. 645.

58. **Divorce**—Alimony.—Alimony or maintenance is not granted as a matter of course upon a mere allegation of marriage, being imposed to compel the performance of a duty, and not as a penalty, and can only be awarded on equitable grounds in view of the situation of the parties.—*State v. Superior Court of King County*, Wash., 104 Pac. 771.

59.—Granting on Consent of Parties.—A divorce will not be granted on consent of parties, but a cause must be proved to the court's satisfaction, independently of either party's fault or confession.—*People v. Case*, Ill., 89 N. E. 638.

60. **Domicile**—General Rule Governing.—The general rule is that a man must have a habitation somewhere, and that he can have but one, and that in order to lose one he must acquire another.—*Miller v. Sovereign Camp Woodmen of the World*, Wis., 122 N. W. 1127.

61. **Drains**—Notice of Repairs.—Ordinary repairs of a drainage ditch may be made without notice to interested property owners.—*In re Renville Co.*, Minn., 122 N. W. 1120.

62. **Easements**—Establishment.—The granting of a right of way and its acceptance by proper authority and in a proper manner will be presumed from an uninterrupted adverse user for 15 years.—*City of Louisville v. Tompkins*, Ky., 122 S. W. 174.

63. **Ejectment**—Strength of Defendant's Title.—Where the defendant in ejectment show prima facie title, plaintiff must overcome such title and show title in himself, as he can only rely on his own title.—*Maney v. Burke*, Ark., 122 S. W. 111.

64. **Estoppel**—Specific Performance.—Where a clerical error in a contract is recognized by the parties thereto in an action at law thereon, the question of error in the contract was foreclosed in a subsequent suit for specific performance.—*Gates v. Detroit & M. Ry. Co.*, Mich., 122 N. W. 1078.

65. **Evidence**—Matters of Common Knowledge.—A court cannot pretend to be ignorant of facts as to a strike of employees in a large city within its jurisdiction, which are common to the knowledge of every intelligent person within the county.—*Connett v. United Hatters of North America*, N. J., 74 Atl. 188.

66.—Objections by Party Introducing.—A party who introduced witnesses, while not bound by their testimony, cannot insist that they are unworthy of belief, and, unless their testimony is self-contradictory or inherently improbable, it cannot be disregarded.—*United States v. Barber Lumber Co.*, U. S. C. C., D. Idaho, 172 Fed. 948.

67.—Parol Evidence Affecting Writing.—An oral promise by the payee to the surety on a note, when executed, not to enforce its payment against him, does not affect the surety's obligation.—*Eambro v. Keith*, Tex., 122 S. W. 40.

68.—Parol Evidence.—A joint maker of a

note cannot change it by parol evidence to the effect that the payee had told him that he had nothing to do with the note, but that it would be taken care of.—*Lipsett v. Hassard*, Mich., 122 N. W. 1091.

69.—**Truth of Testimony.**—A party calling a witness does not vouch for the truth of his testimony.—*Lewis v. Wabash R. Co.*, Mo., 121 S. W. 1090.

70.—**Value of Property.**—Evidence of the price paid for property is not evidence of its market value.—*Texarkana & Ft. S. Ry. Co. v. Neches Iron Works*, Tex., 122 S. W. 64.

71.—**Warehouse Receipt.**—A warehouse receipt issued by a warehouseman held a contract fixing the rights of the parties, and not to be varied by parol in the absence of an averment of fraud or mistake.—*Offutt & Blackburn v. Doyle*, Ky., 122 S. W. 156.

72.—**Weight.**—Statement of a witness that he did not hear an engine bell at a crossing, with no accompanying facts, is of no value as evidence, but attending circumstances may make the statement strong affirmative evidence.—*Slattery v. New York, N. H. & H. R. Co.*, Mass., 89 N. E. 622.

73. **Exchange of Property—Pleading.**—Where defendant, in an action to set aside a deed, in addition to the general denial, specially pleaded plaintiff's ratification of the transaction, the burden was upon defendant to establish the ratification.—*Koppe v. Koppe*, Tex., 122 S. W. 68.

74. **Exemptions—Time for Claim.**—While a judgment debtor may waive his exemption, the statute does not require him to notify the sheriff before the execution sale or before the execution of the indemnity bond that he claims the property as exempt.—*Winstead v. Hicks*, Ky., 121 S. W. 1018.

75. **False Imprisonment—Probable Cause.**—While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.—*Campbell v. Hyde*, Ark., 122 S. W. 99.

76. **Fire Insurance—Ownership Clause.**—A fire policy held not avoided by its sale and unconditional ownership clause; the insurer's agent having been told by insured of his conditional ownership of some of the property.—*Miller v. Prussian Nat. Ins. Co.*, Mich., 122 N. W. 1093.

77. **Forcible Entry and Detainer—Civil Liability.**—It is not competent to try title in forcible entry, but in whom the legal title was vested at the time of entry is necessary to be ascertained, where on that alone depends the question whether plaintiff was in actual possession when defendant entered.—*Richi v. Owsley*, Ky., 121 S. W. 1015.

78. **Franchises—Term.**—A franchise granted to a corporation, without limitation as to term, held limited to the life of the corporation.—*People v. Economy Light & Power Co.*, Ill., 89 N. E. 760.

79. **Guaranty—Original Obligation.**—Defendant's agreement to assume payment of a catalogue, which plaintiff had contracted with another to print held an original obligation, and not a guaranty.—*General Lithographing & Printing Co. v. Washington Rubber Co.*, Wash., 104 Pac. 650.

80. **Habeas Corpus—Custody of Child.**—The father of a child has the first claim to its custody, unless he has abandoned it, is incapable

to care for it, or there is some strong reason for denying his right.—*Orey v. Molder*, Mo., 121 S. W. 1102.

81. **Homestead—Option Contract.**—A wife's homestead declaration, made subsequent to the husband's option to convey the property to plaintiff on plaintiff's demand, held subject to such option, and no defense to plaintiff's suit for specific performance.—*Smith v. Bangham*, Cal., 104 Pac. 689.

82. **Improvements—Set Off Against Rent.**—At common law, the true owner of land held entitled to enter thereon and own the improvements placed thereon by a bona fide possessor, while equity required the value of the permanent improvements to be offset against the owner's claim for rents and profits.—*McDonald v. Rankin*, Ark., 122 S. W. 88.

83. **Injunction—Interference With Contract by Third Person.**—A contract between an employer and its employees that the latter shall not join a labor union and that the employer shall not employ union men is valid, and a combination between officers or members of a labor union to induce a violation of such a contract is an unlawful conspiracy, the carrying out of which may be enjoined.—*Hitchman Coal Co. v. Mitchell*, U. S. C. C., N. D. W. Va., 172 Fed. 963.

84.—**Ordering and Encouraging Strikes.**—The principle that every man is bound by his own acts applies to acts by labor unions in ordering a strike and encouraging its continuance, and they must be held accountable for all results properly traceable to their original action.—*Connell v. United Hatters of North America*, N. J., 74 Atl. 188.

85. **Judicial Sales—Void Decree.**—A sale under a void decree confers no title, and the purchaser, though a stranger to the suit, is not an innocent purchaser so as to acquire title.—*McDonald v. Rankin*, Ark., 122 S. W. 88.

86. **Landlord and Tenant—Adverse Possession.**—A lease of land in possession of the alleged tenant and the execution of a note for the rent held void, where the tenant was then the owner of the land by adverse possession.—*Johnson & Burr v. Elder*, Ark., 121 S. W. 1066.

87. **Libel and Slander—Comment on Public Matters.**—The public conduct of public men is properly subject to legitimate discussion.—*Lawrence v. Herald Pub. Co.*, Mich., 122 N. W. 1084.

88.—**Damages.**—When a mercantile agency is charged as for a libel, it must appear, when the words relied on are not libelous per se, that some pecuniary loss has been sustained.—*Denneny v. Northwestern Credit Ass'n*, Wash., 104 Pac. 769.

89. **Limitation of Actions—New Cause of Action.**—Where a declaration stated a cause of action defectively, an amendment curing the defects was not subject to limitations as stating a new cause of action.—*Lee v. Republic Iron & Steel Cos.*, Ill., 89 N. E. 655.

90. **Lis Pendens—Title Acquired.**—The doctrine of lis pendens applies to purchasers or others acquiring title from a party to a pending action, and generally does not apply to strangers to the suit.—*McDonald v. Rankin*, Ark., 122 S. W. 88.

91. **Mandamus—Inspection of Corporate Books.**—The remedy of a stockholder, denied permission to inspect the corporate books, held to be by mandamus, and not by mandatory injunction.—*Brown v. Crystal Ice Co.*, Tenn., 122 S. W. 84.

92. Marriage—Nature of Relation.—In Christian nations, marriage is not a mere contract to be suspended or dissolved at pleasure, but rather a status based on public necessity and controlled by law for the benefit of society at large.—*People v. Case*, Ill., 89 N. E. 638.

93. Master and Servant—Assumed Risk.—A trainman knowing of obstruction maintained by the railroad near track does not assume the risk.—*Louisville & N. R. Co. v. Hahn's Adm'r.*, Ky., 122 S. W. 142.

94.—Assumption of Risk.—A master need not instruct a servant, 14 years old, and possessing average intelligence, concerning a danger appreciated by him.—*Cronin v. Columbian Mfg. Co.*, N. H., 74 Atl. 180.

95.—Contributory Negligence.—Contributory negligence of a plaintiff, in an action against his employer for a personal injury held not established as matter of law by the testimony of an expert witness.—*Carter, Rice & Co. v. Aubin*, U. S. C. of App., First Circuit, 172 Fed. 916.

96.—Correlative Rights.—The employer and employee have correlative rights, which appear in our constitution in the clause "among which are those of enjoying and defending life and liberty," etc., and there is no law applicable to one that does not apply to the other with equal force.—*Connett v. United Hatters of North America*, N. J., 74 Atl. 188.

97.—Instructions as to Danger.—An employee of an independent contractor injured by coming in contact with an electric wire could not complain of the electric light company for failure to instruct him as to the danger.—*Myers v. Edison Electric Illuminating Co.*, Pa., 74 Atl. 223.

98.—Safe Place to Work.—If defendant knew of the danger in sending an employee under an oil tank car to unscrew the nipple of the pipe when the valve was open, so as to permit the oil to rush out when the nipple was removed, but the servant did not know of the danger and could not discover it, defendant would be liable for resulting injuries.—*Galveston H. & S. A. Ry. Co. v. Sanchez*, Tex., 122 S. W. 44.

99. Mines and Minerals—Ejectment by Lessee.—Ejectment held obtainable by an oil and gas lessee, though he had not entered into possession, against a third person claiming adversely to lessor.—*Barnsdall v. Bradford Gas Co.*, Pa., 74 Atl. 207.

100. Representation Work.—The representation work required by federal statutes to preserve mining claims may be done on the claims themselves, on a group of contiguous claims, or on adjacent patented or public land.—*Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co.*, Mont., 104 Pac. 540.

101. Mortgages—Property Subject.—A purchaser in possession of real estate under a contract of sale has an interest which may be mortgaged.—*Scott v. Farnam*, Wash., 104 Pac. 639.

102.—Redemption.—Where a purchaser of a judicial sale has by a course of conduct induced the owner to refrain from redeeming within the period of redemption by fraudulent representations or promises which would not constitute a contract, equity will grant relief.—*Ogden v. Stevens*, Ill., 89 N. E. 741.

103. Municipal Corporations—City Ordinances.—Where an act is prohibited by state law, a city ordinance previously in force cannot be invoked to permit the same act.—*Mayhew v. City of Eugene*, Ore., 104 Pac. 727.

104.—Contributory Negligence.—A traveler's failure to observe an obstruction in a street by which she was thrown from her wagon and

injured held not contributory negligence as a matter of law.—*City of Louisville v. Tompkins*, Ky., 122 S. W. 174.

105.—Use of Streets.—The public will not be heard in equity to complain of an abutting owner's act, which does not unreasonably interfere with the public's use of a street for travel.—*Pickrell v. City of Carlisle*, Ky., 131 S. W. 1029.

106.—Vacating Part of Street.—An owner of property abutting on a street, a part of which is vacated, held to suffer special injury entitling him to sue to set aside the vacation.—*Smith v. City of Centralia*, Wash., 104 Pac. 797.

107. Navigable Waters—Burden of Proof.—One claiming that a stream is navigable is not bound to show that it is navigable in its entirety, or that the navigable portion is open for navigation during the whole year.—*People v. Economy Light & Power Co.*, Ill., 89 N. E. 760.

108. Negligence—Joint and Several Liability.—Where the negligence of two contributes to an injury, one may not escape liability on the ground that the other is also liable.—*Tebow v. Wiggins Ferry Co.*, Ill., 89 N. E. 658.

109.—Pleading.—Where a complaint for negligence shows that an act of plaintiff was the proximate cause of the injury, it must allege plaintiff's freedom from negligence.—*Badovinac v. Northern Pac. Ry. Co.*, Mont., 104 Pac. 543.

110.—Proximate Cause.—Where the circumstances concuring with the negligent act might reasonably have been foreseen, the master guilty of such negligent act held liable.—*Stehle v. Jaeger Automatic Mach. Co.*, Pa., 74 Atl. 215.

111. Parties—Bringing in Additional Parties.—The court has inherent power to require additional parties to be brought in.—*In re Clerf*, Wash., 104 Pac. 622.

112. Partition—Suit in Equity.—A partition suit which deals with equitable interests is in equity, and a court of chancery has jurisdiction notwithstanding the statutory remedy in partition.—*Coffman v. Gates*, Mo., 121 S. W. 1078.

113. Partnership—Action by Partner.—One partner may not sue another at law except for personal torts having no relation to the partnership.—*Freund v. Murray*, Mont., 104 Pac. 683.

114.—Deed to Partnership.—A deed to a partnership in its firm name, when the purchase was by the partners individually, held not void in equity, but subject to correction.—*Spaulding Mfg. Co. v. Godbold*, Ark., 121 S. W. 1063.

115.—Judgment in Name of Partnership.—A judgment in the name of a partnership, objection not having been made before judgment, held not void.—*Spaulding Mfg. Co. v. Godbold*, Ark., 121 S. W. 1063.

116.—Torts of Agent.—A partnership is not liable for the slanderous utterance of its servants unless the actionable words were spoken by its express consent, direction, or authority, or were ratified by it.—*Duquesne Distributing Co. v. Greenbaum*, Ky., 121 S. W. 1026.

117. Payment—Discharge of Debt.—The obligor's intention is important in determining the question whether obligations have or have not been extinguished by payment.—*Fisher v. City of Seattle*, Wash., 104 Pac. 655.

118. Physicians and Surgeons—Malpractice.—In an action against a physician for malpractice, plaintiff is not entitled to recover smart money.—*Helland v. Bridenstine*, Wash., 104 Pac. 626.

119. Pleading—Construction.—While on demurrer and before judgment, pleadings are strictly construed against the pleader, after verdict or judgment they are liberally construed to sustain the judgment, and merely formal defects will be held cured.—*Winstead v. Hicks*, Ky., 121 S. W. 1018.

120. Principal and Agent—Employment of Agent.—A contract whereby a manufacturer appointed one its exclusive agent for the sale within a specified territory of its product held not to prevent the manufacturer from making sales in the territory on the payment of commissions thereon.—*Clairmonte v. Napier Motor Co. of America*, Cal., 104 Pac. 712.

121. Principal and Surety—Extension of Time

for Payment.—An extension of time for payment of a note, on consideration that the maker would pay interest accruing, held to release the surety.—*Fambro v. Keith*, Tex., 122 S. W. 40.

122. Prohibition—Jurisdiction.—Want of jurisdiction is an insufficient ground for the issuance of a writ of prohibition if there be a plain, speedy and adequate remedy at law.—*Burge v. Justices' Court of City & County of San Francisco*, Cal., 104 Pac. 581.

123. Nature of Remedy.—At common law the writ of prohibition prevents excess or usurpation of jurisdiction, and prohibition may not be resorted to when the ordinary remedies by appeal, writ of review, certiorari, or injunction, or other modes of review, are available.—*State v. Durant*, Utah, 104 Pac. 760.

124. Public Lands—Survey.—A mistake in a government survey of a lake may be corrected.—*Johnson & Burr v. Elder*, Ark., 121 S. W. 1066.

125. Railroads—Injury to Alighting Passengers.—Where a train was stopped for a reasonable time to afford the passengers an opportunity to alight in safety, the trainmen in starting the train could assume that a passenger had availed herself of the opportunity with reasonable promptness.—*Chicago, B. & Q. R. Co. v. Lampman*, Wyo., 104 Pac. 538.

126. Injury to Person Near Track.—A railroad company held not required to load or inspect its car to prevent coal falling from it on one playing on its grounds near the track.—*Covington & C. R. Transfer & Bridge Co. v. Mulvey's Adm'r*, Ky., 122 S. W. 129.

127. Religious Societies—Governmental Powers.—The Presbyterian Church consists of members and officers, and its governmental power comes, not from the people, but from the Divine Founder of the Christian religion, which power is vested in church officers, organized into church courts, acting in accordance with a written constitution.—*Ramsey v. Hicks*, Ind., 89 N. E. 597.

128. Sales—Performance.—One selling a machine need not, in an action for its price, show that any of the parts of the machine were perfect, it being sufficient that they were of fair ordinary quality as compared with the parts of other machines of that kind.—*Fuchs & Lang Mfg. Co. v. R. J. Kittredge & Co.*, Ill., 89 N. E. 728.

129. Set-off and Counterclaim.—Action on Indemnity Bond.—In an action by an execution debtor on an indemnity bond given the sheriff for damages for the levy on and sale of exempt property, it was error to adjudge that the damages be set off by the amount of the original judgment.—*Winstead v. Hicks*, Ky., 121 S. W. 1018.

130. Specific Performance—Contracts Enforceable.—Specific performance of a contract will not be enforced, unless its terms are clear.—*McKenna v. Mickelberry*, Ill., 89 N. E. 717.

131. Option Contract.—In a suit to compel specific performance of a contract to convey land pursuant to an option, the adequacy of the consideration paid for the option was immaterial.—*Smith v. Bangham*, Cal., 104 Pac. 689.

132. Sale of Land.—The general rule is that the sufficiency of an abstract of title on a bill for specific performance by a purchaser is to be determined as of the date fixed by the contract, or by agreement of the parties, when vendor was to furnish the abstract and the deal was to be closed, and not at some time subsequent to filing the bill.—*Smith v. Hunter*, Ill., 89 N. E. 686.

133. Statutes—Repeal by Implication.—Repeals of statutes by implication may not be worked piecemeal.—*State v. Mitchell*, Wash., 104 Pac. 791.

134. Repeal by Inadvertence.—The theory of repeal by inadvertence is not to be considered if, by the application of any rule of construction, another result may be arrived at.—*City of Los Angeles v. Lelande*, Cal., 104 Pac. 717.

135. Street Railroads—Time to Alight.—A car having been stopped in response to a passenger's signal to alight, the operatives should exercise care not to start it until assured that no per-

son was in the act of alighting.—*Groshong v. United Rys. Co. of St. Louis, Mo.*, 121 S. W. 1084.

136. Telegraphs and Telephones—Commercial Messages.—Where a message relates to a commercial business, the telegraph company has notice of any actual damages that may result from its negligence.—*Western Union Telegraph Co. v. Askew*, Ark., 122 S. W. 107.

137. Delay in Delivery.—Prolongation of anxiety on delivery of a message informing a daughter of her father's fatal illness held not a basis for damages.—*Goodhue v. Western Union Telegraph Co.*, Tex., 122 S. W. 104.

138. Injury from Broken Wires.—Telephone company held not liable to pedestrian injured by coming in contact with one of its wires which had broken in a storm, and had become charged with electricity from an electric light wire.—*Stark v. Pennsylvania Telephone Co.*, Pa., 74 Atl. 222.

139. Regulation of Business.—A telegraph company may prescribe reasonable rules for its business, and reasonable hours during which messages may be sent and delivered at certain offices.—*Western Union Telegraph Co. v. Harrison*, Ark., 121 S. W. 1051.

140. Trespass to Try Title—Adverse Possession.—In trespass to try title, held not error to assume that possession was adverse.—*Washam v. Harrison*, Tex., 122 S. W. 52.

141. Trial—Special Verdict.—Where a special verdict submitted covered the issues precisely, the court was justified in refusing to submit any other questions.—*Monture v. Regling*, Wis., 122 N. W. 1129.

142. Trover and Conversion—Burden of Proof.—Defendant in trover claiming on account of his good faith a modification of the rule as to damages has the burden of showing that he was in fact an innocent converter.—*Hassam v. Safford*, Vt., 74 Atl. 197.

143. Measure of Damages.—The general measure of damages for conversion of property is its market value at the time and place of conversion, with legal interest.—*Texarkana & Ft. S. Ry. Co. v. Neches Iron Works*, Tex., 122 S. W. 64.

144. Trusts—Resulting Trusts.—Where a widow and heirs purchased certain land at a partition sale by receipting to master for one-third of the bid, they took title in trust for those entitled to the property under their ancestor's will.—*Worrell v. Torrance*, Ill., 89 N. E. 693.

145. Vendor and Purchaser — Recording of Mortgage.—The recording of a mortgage executed by a purchaser in possession under the contract of sale held notice to any subsequent purchaser of the vendor of the mortgagee's right to purchase under the contract.—*Scott v. Farnam*, Wash., 104 Pac. 639.

146. Title of Vendor.—A court of chancery will not force on a purchaser a title clouded with substantial defects, or one that he may be required to engage in litigation to defend, or one that he cannot easily dispose of by reason of defects therein.—*Smith v. Hunter*, Ill., 89 N. E. 686.

147. Venue—Transitory Action.—An action to enforce a trust in real and personal property held transitory and not local.—*State v. Superior Court of Pierce County*, Wash., 104 Pac. 607.

148. Water and Water Courses—Public Water Supply.—A corporation accepting a franchise from a municipality to supply its inhabitants with water held to impliedly contract to serve all.—*Hatch v. Consumers' Co.*, Idaho, 104 Pac. 670.

149. Wills—Foreign Wills.—An authenticated copy of a will probated in a foreign jurisdiction held not to be first probated in the county court in West Virginia before it is offered as evidence in the circuit court in an appellate proceeding.—*In re Rumford's Will*, W. Va., 66 S. E. 10.

150. Witnesses—Credibility.—That a witness in a criminal case is to be paid a reward in the event of the conviction of the defendant may affect his credibility, but does not render him incompetent.—*Union v. State*, Ga., 66 S. E. 24.

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THE OFFICE OF AN OPINION BY ONE
MEMBER OF AN APPELLATE COURT.

We have been informed that at one of the annual sessions of the American Bar Association some Canadian jurist, speaking before that body, declared, that most of the dicta of Chief Justice Marshall were later declared to be law. That, however, does not show, necessarily, that it was either useful or not harmful that they should have been voiced. And, then, every judge is not a John Marshall. Indeed, if utterance of dictum was intended to have ulterior effect, our great Chief Justice was acting outside of his office. He has often been quoted in the way of advising extreme caution against taking dicta at their full face value.

But whatever of allowance might be made for any discursiveness in opinions in early days—especially where constitutional questions were involved—this ought not to be expected in opinions in these times, however erudite their writers, if decided cases of controlling weight may be relied on or distinguished.

Our attention has lately been called to dictum writing (see editorial and annotation, 70 Cent. L. J. 49, 61), and our reflection has brought us to the opinion that, if the judges would curtail theoretical discussion, they would both assist themselves and lawyers, who have to look to what they write, in understanding the course of precedent in their states.

Let us give an illustration in a late Missouri case of what is to our mind a very objectionable opinion in which everybody concurred. In *Casey v. Schwelty*, 221 Mo. 132-139, the court said: "There is no federal

question involved in this case. The most that the plaintiffs contend for is that the court misconstrued the Colorado statute; but the mere construction of the statute of another state, though it should be an erroneous construction, does not deny its validity," and: "The Kansas City Court of Appeals alone has jurisdiction of this appeal, and therefore the cause is transferred." One would say that this is all that a court without jurisdiction need or could rightfully say. But did the court stop here? On the contrary, but for several pages it discourses about the full faith and credit clause of the federal constitution; the non-enforceability of a penal statute in another state; whether public statutes come under the faith and credit clause or not; the difference between a suit on a foreign statute and that on a foreign judgment, and interpretation by the law of the place of contract. Whether the judge discoursed wisely and well boots nothing in legal effect, but neither the bench nor the bar ought to be affected by his prejudgment in the matters, nor should the court reporter ever have sectionized what was said into syllabi.

It would need no astute reasoning to determine that everything said outside the jurisdictional question was *vox et praeterea nihil*. The case illustrates most strongly, however, how prone are judges to write, because they have a chance to write.

But while we are talking about the Missouri court, in the selection of a specimen of dictum, let us take the same volume, the last report of that court extant, and compare it with 89 Ark., which is also down to date.

Here are two comparatively old states and many years of adjudication stand behind the utterances in these volumes. They ought to be profitable to the benches of to-day or the lives of former judges were lived to a great degree in vain, as might be said of those who are now "drest with a little brief authority." If former judges have built monuments, it might be well surmised that few are the roads their experience and industry have left unblazed. How do these volumes stand to such a supposition?

In the first place the Arkansas volume has nearly two hundred fewer pages and more than twice as many cases. Secondly, in glancing through the cases it seems that the opinions in the Arkansas cases rarely refer for their propositions to other than Arkansas cases, while those in the Missouri cases are rare which do not also refer to outside cases.

Thus it looks like the Arkansas lawyer is far more apt to know the course of precedent in Arkansas than the Missouri lawyer to know the course of precedent in Missouri. Furthermore, this would seem to account for the shorter Arkansas opinions. The statement of a proposition and the citation of apt authority in a prior decision make elaborate discussion unnecessary. But the statement of a proposition and the citation of persuasive authority still leaves discussion open.

And for this discussion who cares anything, any more than he would for a law magazine article? But it is there to puzzle one as to the extent it represents the view of the court or only that of the writer of the opinion.

We all may agree that it would hardly become the judge of an appellate court to be a prolific writer of magazine articles, whenever an interesting question in law might present itself for discussion. Those articles might confront him very often and, apart from their being objectionable because of possibility of open or covert use, they might either incline a judge to adhere to his expressed views through pride of opinion, or he might be suspected of being thus affected.

Nevertheless we see opinions crowded with dicta, and we have sometimes seen those, who uttered them, clinging to them with a tenacity that looked almost unjudicial. The effect upon the mind of counsel for a losing litigant would be unsatisfactory, though he might excuse it because of the weakness of human nature. We think judges fall into serious error, when they either think it their duty to expound general principles of law, at the possible sacrifice of clearness in particular applications

to stated facts, or that they are proceeding as surely to the upbuilding of clear precedent.

A clear statement of facts is considered the most persuasive presentation by counsel to a competent court, but it is hard for a court, that always feels complimented by counsel content to thus rely on it, to bring itself to thus compliment the bar. But the courts must argue and argue the same things over and over again, and cite repetitions of other courts, binding on nobody. Counsel must be responsive to this disposition, or mood, or practice, searching digests for cases, and, then, the courts complain of multitudinous briefs.

Let us suggest the Arkansas practice as we gather it to appear from the latest volume of its reports, and in time reference in opinion to persuasive authority will be taken to mean that the proposition is a new one in the jurisdiction relying on such authority. We will begin then to know where we are.

It is our opinion that the less a judge puts in an opinion of that which is not demanded by a case, the more he makes to stand out, in broad relief, what the court means, and the more he gives an example of ability to separate the wheat from the chaff,—the former to be stored in the granary of jurisprudence for the beneficent sustenance of our progressive, but complex, conditions.

In this great country we need simplification in our law. Discussions of principles had better proceed through other channels, while the courts are laboring to apply them in concrete cases. If they are applied justly, the unending procession of causes will better evolve the true rules that justice demands. Then judges, who should possess an atmosphere of calm, will be more apt to secure it in not attempting the role of essayists, promulgating views for which alone there should exist merely a personal responsibility. When one has to wonder whether a proposition is that laid down by a writer or by a court, it were better to leave it unstated. Let it first arise and be debated before the court.

NOTES OF IMPORTANT DECISIONS.

HUSBAND AND WIFE—PRIVILEGED COMMUNICATION COMING TO THE KNOWLEDGE OF THIRD PERSON.—The case of *O'Toole v. Ohio German Fire Ins. Co.*, 123 N. W. 795, decided by the Michigan Supreme Court presents the interesting question of the admissibility in evidence of statements made in a letter by a wife to a husband which was lost by the husband. The wife was suing for loss on a fire insurance policy and the statements made were damaging to her upon an issue of incendiarism. The court said:

"A communication made by a husband to his wife may be privileged. The same communication made by him to a daughter, or a son, or a sister, is not privileged, although precisely the same reasons in fact may exist for preserving the confidence inviolate. The privilege is in derogation of the general rule that all persons may be compelled to testify concerning facts inquired about in courts of justice. It should be made effective, but ought not to be extended by the courts to cases where there has been no injury to the relation of the parties by the betrayal of the confidence reposed. And so it has been held, and we think correctly, that where the communication, oral or written, has, without collusion or voluntary disclosure, escaped the custody and control of the parties communicating or the custody or control of their agents or representatives it is not privileged. The communication being offered by some one other than the parties thereto, courts have in some instances refused to inquire as to the manner in which it was obtained. The cases are not numerous; the rulings are not harmonious. Some of them are collected in 23 Am. & Eng. Ency. of Law, p. 95 et seq. Precisely in point are *State v. Mathers*, 64 Vt. 101, 23 Atl. 590, 13 L. R. A. 268, 33 Am. St. Rep. 221; *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89; *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193; *Com. v. Griffin*, 110 Mass. 181; *Geiger v. State*, 6 Neb. 545. See, also, 1 Greenleaf, Evid. (15th Ed.) secs. 251, 254a, and notes, and note to *State v. Falsetta*, 43 Wash. 159, 36 Pac. 168, 10 Am. & Eng. Ann. Cas. 177, 179. See, generally, 4 Wigmore on Evidence, secs. 2332, 2341. The precise question seems never to have been before presented in this court. In *People v. Durfee*, 62 Mich. 487, 29 N. W. 109, a deputy sheriff was allowed to testify to a conversation between attorney and client overheard by the witness. In *Cluett v. Rosenthal*, 100 Mich. 103, 58 N. W. 1009, 43 Am. St. Rep. 446, it was held that information obtained

by a witness by means of a trespass or other tortious conduct may be received when offered by one not responsible for the tort. These decisions, as well as those which in holding that a privilege is involved refuse the rule that the evidence is under all circumstances incompetent, permit us to adopt and to apply what we have indicated as being in our opinion the correct rule. The letters should have been received in evidence."

This ruling offers no room for lack of harmony, for even though it may be that "the privilege is in derogation of the general rule," it may well be thought, that if it is to be recognized at all, it ought to be recognized in its fullness. The privilege is based on the relationship of husband and wife and it applies to what comes within its pale. If the communicant makes a statement that is privileged at the time, some subsequent accident ought not to destroy what the law has afforded.

MASTER AND SERVANT—DEVIATION FROM COURSE OF EMPLOYMENT.—In an annotation upon Responsibility of Owner of Automobile as a Dangerous Machine, we referred to some cases which carried responsibility of master over to departure from course of duty by reason of the servant being intrusted with dangerous machinery or appliances. 69 Cent. L. J. 360.

In a late case in the Second Department, Appellate Division, New York Supreme Court, the question of such responsibility is treated where no such entrusting was involved. *Jones v. Weigand*, 119 N. Y. Supp. 441.

The facts show that a coach driver ran over plaintiff on the street. The vehicle had been sent to an undertaker for use at a funeral, and after that the driver took a circuitous, instead of a direct, route, going several blocks out of his way, part of the time in the opposite direction. While so out of the way he called at a house to make a personal visit, leaving the carriage and horses in front of the door. Plaintiff, a little child, playing near the step of the coach unnoticed, was run over by the coach as the driver, mounting to his place, started up.

The Appellate Division, in reversing the judgment dismissing the suit, said:

"The point is very nice, and the discrimination between some of the cases very fine, though the general rule is well settled. The master is liable only for acts done by the servant in the course of his employment as such; but mere disregard of instructions or deviation from the line of his duty does not relieve the master of responsibility. Wrongful acts are usually in violation of orders, or in deviation from the strict line of duty. The test is whether the act was done while the

servant was doing his master's work, no matter how irregular, or with what disregard of instructions. If the servant, for purposes of his own, departs from the line of his duty, so that for the time being his acts constitute an abandonment of his service, the master is not liable; but, to constitute an abandonment of the service, the servant must be serving his own or some other person's purposes, wholly independent of his master's business. It seems to me that the making of the circuitous route to the stable was at most a deviation, not an abandonment, of the service. While the servant deviated from the direct route, he was nevertheless engaged in taking the coach back to the stable. He combines his own with his master's purposes, but did not wholly abandon his service, except during the time when he was absent from the coach to make his call.

But, if the foregoing be doubtful, it seems plain that, when the driver returned to the coach for the purpose of taking it back to the defendant's stable, he re-entered upon his master's service, and resumed the business which he had temporarily abandoned. It is no answer to this to say that the accident would not have happened if he had not made the call. His carelessness after he had resumed his master's business was the *causa causans* of the accident."

The point really decided is that deviation from duty has at most only the effect, if it even goes that far, of absolving the master during the period of such deviation.

Of course, it is clear, that but for the deviation, the servant would not have been at the place where the injury occurred, but it is also evident that the master, unless he immediately discharge the servant for the deviation, would order the servant to return with the coach to the stable. Indeed, there was no other thing for him to do.

But we are inclined to the view that during deviation the master ought to be responsible. The servant was still in possession of the coach and under the master's control as much as if on the prescribed route. This deviation was a disobedience of the same nature as flecking a spirited team contrary to orders, or racing along the route when told to go slow. Each of the acts is a deviation, in its nature, but no one would say the latter absolved the master.

A master is bound to proper management by his servant as a coachman, generally, wherever he may be, if he is still entrusted as a driver, and it seems to us that Massachusetts cases, which hold to no responsibility during such departures as in this case are not sound. See Perlstein v. Express Co., 177 Mass. 530, 52 L. R. A. 959; McCarty v. Timmins, 178 Id. 378, 86 Am. St. Rep. 490.

Any other rule would cause an excessive refining, equal to metaphysics in logic or theology, and after all the question would rest on the fact that the master has employed an untrustworthy servant, and the public must suffer therefor.

SEWAGE EFFLUENTS AND POLLUTION BY DRAINAGE BOARDS.

A case on the pollution of rivers by sewage effluents was recently decided by the court of appeal, and was described by the Master of the Rolls as one of great importance, not merely to the particular locality, but to all corporate bodies and drainage boards throughout the country. The case is Attorney General v. Birmingham, Thame and Rea District Drainage Board. (Not yet reported).

The value of the case lies in the interpretation put by the court upon section 17 of the English Public Health Act, 1875. That section provides as follows: "Nothing in this act shall authorize any local authority to make or use any sewer, drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal, pond or lake, until such sewage or filthy water is freed from excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse, or in such canal, pond or lake."

The court in construing this act said they must be careful to give it such an interpretation that, while protecting the streams, it should not unduly hamper the sanitary authorities in the execution of their drainage works.

The defendant board is a district drainage board formed under section 279 of the Act for the purpose of disposing of the sewage of Birmingham and of several populous places surrounding that city. It had very large sewage disposal works on the banks of the river Thame and complaints of pollution had been made by the borough

of Tamworth, which is situated some little distance further down the stream. These complaints led to the issue of a writ, as far back as 1899, for an injunction to prevent a breach of section 17 of the Act, but the trial of the action was postponed until 1907, as the defendants were carrying out new works. The writ was in the name of the Attorney General, on the relation of the Tamworth Borough Council and the Tamworth Rural District Council. At the trial it was found that the pollution had not altogether stopped; but the defendants asked for further time to complete their works. Kekewich, J., was, however, of opinion that he was bound to grant an injunction. He said that the Attorney-General, when coming to complain that a public body is exceeding its powers or committing some offense against a statute, is entitled, as a matter of right on proving his case, to an injunction, and he also refused to suspend its operation.

This was a somewhat curious result, as Kekewich, J., in his judgment, stated that it had been conclusively proved that the defendants had done their best to discharge the duties imposed upon them by the legislature, and that to this end they had employed not only money without stint, but to the best of their ability and so far as circumstances had hitherto permitted all the means which the resources of modern science had placed at their disposal, and they hoped within a reasonable time to solve the problem.

The defendant board appealed and the Court of Appeal suspended the injunction until such time as the works had been concluded. The case came on again in June last, when the defendants stated that the pollution had now ceased, but this was stoutly denied by the relators, and there was so much conflict of evidence on the part of the experts, that the court adopted the unusual course of appointing an independent expert to advise the court. The person appointed was Sir William Ramsay, the well-known chemist. He furnished the court with a most elaborate and careful report, the conclusion of which was, that in

his opinion the river was not made fouler by the entry of the Birmingham effluent. He even said that in some respects it was improved. Following the words of the reference to him he stated that "the sewage effluents from the defendants' works which enter the river Thame are to such an extent freed from excrementitious matters that they do not affect or deteriorate the 'purity' of the water in such river (1) at the points of entry, or (2) within a distance of 600 yards therefrom."

When the case came before the court upon this report, the plaintiffs contended that the finding of Sir William Ramsay was not sufficient to show compliance with section 17. The effluent was still a polluting effluent they said, although it might be as pure as the stream into which it flowed, and they contended that section 17 forbade the sending of any liquid of a polluting nature into a natural watercourse. They also said that it did not reach the standard laid down by the commission on sewage disposal. The court of appeal were, however, of opinion that Sir William Ramsay's finding was sufficient. They thought that the section was complied with if the effluent was freed from noxious matter and did not make the stream any worse than it was.

The court took the view, which was also that of Kekewich, J., that the legislature meant by section 17 to authorize sanitary authorities to send sewage effluents into streams, but that they were not to send them in until freed from excrementitious, foul and noxious matter. The water was not to be filthy, but it might contain other matter which was not noxious, and there would be no breach of the section if the stream was not injuriously affected or deteriorated.

This decision will commend itself to sanitary authorities as being a reasonable and sensible interpretation of the law. It is absurd to expect a sewage effluent to be as pure as distilled or even rain water. As Fletcher Moulton, L. J., pointed out, much of the chemical constituents of the foul matter must remain in the water, but if the excrementitious and other such matter

is so treated that it is broken up into harmless and innocuous compounds, the section evidently contemplates that they shall be sent into the river in such a state. It was quite enough if the stream is made no worse than it was before the effluent was poured in. If the other contention had succeeded, it would have been impossible to use any stream for conveying away an effluent, as science has not yet discovered a practical means of rendering an effluent quite pure. Birmingham had spent about 500,000^l on the works, and the court were of opinion that they deserved the thanks of other local authorities for the experiments they had made and the works they had constructed.

On the question of injunction, they did not agree with Kekewich, J. They did not think the Attorney-General was of right entitled to one upon proving the breach of a statute. An injunction was only one form of remedy and the court had jurisdiction as to which remedy they considered most suitable in each particular case. The court below had, however, jurisdiction to grant an injunction, and at the time there was undoubtedly a breach of section 17. The court of appeal had then to consider whether they could dissolve a perpetual injunction which had been properly granted, on the ground that the nuisance had been abated. No case could be found in which the courts had done so, but the court of appeal considered that it was not fair that a public body discharging public duties in a proper way should go on doing so with the sword hanging over their heads in the shape of a perpetual injunction. The court therefore discharged the injunction, subject to the defendants undertaking to use their best endeavors to prevent any recurrence of the breach.

In commenting on this decision, the Justice of the Peace (London) says: 'It would not have been in the interest of sanitation if any other conclusion had been reached. There are many authorities in the country who are still discharging crude sewage into streams, and against which no proceedings have been taken. It would have been a strange piece of irony if a body which has

done all in its power to prevent any nuisance should have been subjected to a perpetual injunction.'

LANDLORD AND TENANT—SURRENDER.

KEAN v. ROGERS.

Supreme Court of Iowa, December 17, 1909.

Where a landlord's agent told a tenant's assignee, who had assumed the lease for the balance of the term, that he had better sell out and quit the business and the premises, and after the assignee had acted on such advice the agent took possession for the landlord, there was a mutual surrender of the lease, and release of the assignee from future rent.

SHERWIN, J.: The lease sued on was executed by the plaintiff and the defendant Rogers in August, 1903, for a term of seven years from the 1st day of September, 1903. The building was used by Rogers for a drug store until he sold his drug stock and transferred the lease to the defendant Hofmaster in the early part of November of the same year. Hofmaster conducted a drug business therein until soon after Christmas, 1905, when he sold his stock and fixtures to one Speedling, who remained in the building a week or ten days and then removed the stock therefrom. Hofmaster had paid the rent up to January 1, 1906, and, upon his refusal to pay the rent which the plaintiff claimed accrued after that time, this suit was brought to collect the same from Hofmaster, and resulted in a judgment for the plaintiff against Hofmaster for a part of his claim. The defendant Hofmaster, among other defenses, pleaded a surrender or abandonment of the lease which was accepted by the plaintiff, and it is to this issue that we shall devote our consideration of the case.

Rogers and Hofmaster were in partnership in the business about four days. Either shortly before the partnership was formed, or while it existed, the public became greatly excited over the death of an intoxicated person in the drug store in question, and it was charged that Rogers was at least partly responsible for the intoxicated condition of the deceased. At that time the plaintiff was in California, and Mr. H. T. Toye, a banker of Northwood, was acting as the plaintiff's agent for the property in question. Both Toye and the plaintiff knew of the sale by Rogers to Hofmaster, and Toye

knew of the sale by Hofmaster to Speedling. Soon after the appellant had bought of Rogers, he became aware of the fact that there was a strong sentiment in the community against the sale of intoxicating liquors, and against his store in particular, because of the death therein of a drunken man. Toye knew of the public excitement and talk from personal contact and observation, and the plaintiff learned thereof at the time through the press and by written communication. Hofmaster and Toye talked of the conditions confronting the former, and Hofmaster says that Toye advised him to quit the business. This conversation is alleged to have taken place before the sale to Speedling. On the 16th of December, 1905, the plaintiff wrote to the firm of Kepler & Westfall, attorneys, advising said firm that he had information that the appellant was making illegal sales of liquor in the leased building, and asking them to look into the matter and to oust Hofmaster as soon as possible if they believed that he was making illegal sales. Kepler & Westfall at once investigated the matter, and wrote the plaintiff that they thought there was nothing in the talk. Notwithstanding the information he had, the plaintiff wrote to the same firm on the 4th of January, 1906, saying: "Hofmaster has nothing to do with the Rogers lease unless I consent to the transfer of the same, and, as I was not consulted, I know nothing about it. Keep your eye, and if anything comes up don't hesitate to act."

Before either of the above letters were written, Rogers had advised the plaintiff that he had sold out to Hofmaster, and that the latter had assumed the lease, yet in the letter of January 4th the plaintiff said, in effect, that Hofmaster had no rights under the lease. The letter clearly shows that the plaintiff did not at that time consider the appellant his tenant under the lease. Mr. Toye does not squarely deny that he advised Hofmaster to quit the business that he was carrying on in the plaintiff's building, and we think the plaintiff's letters and the acts of Toye, as his agent, furnish ample corroboration of Hofmaster. As we have already said, Toye had full knowledge of the sale to Speedling, and at least did not object to his use of the building. When Speedling vacated, he turned the keys over to Toye, who accepted them and later permitted another to use the building for several weeks without any charge for rent, and without the permission of appellant. The plaintiff himself, however, later demanded rent therefor at the rate of \$40 per month. Still later the plaintiff himself permitted a temporary occupancy of the building. There is no question as to the agency of Toye, nor as to the fact that he was in consultation

with Hofmaster as such agent in relation to Hofmaster's continuing the drug business in the plaintiff's building. If, then, Toye told the appellant that he had better sell out and quit the business and the premises, and afterwards took possession thereof for the plaintiff, it would amount to a mutual surrender of the lease, and release the appellant for the payment of future rent. Where the landlord tells the tenant to quit, and he does so, and the lessor takes possession, there is an accepted surrender. 24 Cyc. 1366, 1374; *Boyd v. George*, 2 Neb. (Unof.) 420, 89 N. W. 271; *Patchins' Ex'r v. Dickerman*, 31 Vt. 666; *Schuisler v. Ames*, 16 Ala. 73, 50 Am. Dec. 168; *Terstegge v. Society*, 92 Ind. 82, 47 Am. Rep. 135.

Evidence of the acceptance of the key by the landlord, while not conclusive, is admissible, and may be considered with other testimony as tending to show the acceptance of the surrender. So, also, reletting of the premises is not always conclusive. If the landlord relets on account of the tenant, it is a circumstance of no value; but if the landlord relets on his own account without notifying the original lessee, and he does not consent thereto, such reletting is generally held to show an acceptance of the surrender, unless the lease itself provides for such reletting. There was no provision relating thereto in the lease in question, and the use of the premises by Mr. Emery and the plaintiff's demand for rent therefor furnishes evidence tending to support the claim of the defendant that there was a mutual surrender of the lease. The act of Mr. Toye in permitting Emery to use the building was ratified by the plaintiff when he demanded of Emery rent therefor. It is also the general rule that an absolute and unqualified taking of possession by the landlord shows an acceptance, unless the landlord indicates to the tenant, at that time, his purpose to hold him liable for the rent. *Armour Packing Co. v. Des Moines Pork Co.*, 116 Iowa, 723, 89 N. W. 196, 93 Am. St. Rep. 270. In this case the plaintiff, through his agent, took such possession without a word to the defendant Hofmaster. It is true that several months thereafter he notified Hofmaster that he intended to hold him for the rent; but, when a complete surrender has taken place, a lease cannot be revived by the action of only one party thereto.

Our finding that there was a mutual surrender of the lease makes it unnecessary to consider the other points relied upon for a reversal.

The appellant is not liable for rent of the premises after January 1, 1906, and the judgment of the district court must be, and it is, reversed.

Reversed.

NOTE—Surrender of Premises by Operation of Law.—A surrender differs from abandonment in that it includes the latter and its acceptance, that is, surrender extinguishes the leasehold interest and so does abandonment in pursuance to express agreement or when followed by acts so irreconcilable with a continuance of the tenancy as amount to a surrender. 24 Cyc. 1366, and cases cited. Surrender, therefore, is a technical expression which in its completeness represents acts on both sides, or an act on one side and estoppel arising out of acts on the other. Surrender by operation of law is the technical equivalent for the latter. *McKinney v. Reader*, 7 Watts (Pa.) 123. The acts which are the components of this sort of surrender are as variant as in other estoppels and, therefore, it is scarcely to be expected, that harmonious cases may be found or that underlying principles may be clearly exemplified in decision.

For example let us set forth somewhat fully a Missouri case.

In the case of *Sander v. Holstein Com. Co.*, 118 Mo. App. 29, there was a tenancy from month to month and tenant of a place of business vacated same without giving the requisite thirty days' notice. The landlord, occupying the adjoining store, used the vacated premises for storing chicken coops, barrels of apples and Christmas trees, merchandise in his line of trade, entering there by the key, which had been left with him under his protest. The trial court instructed that though "plaintiff thereafter took and used said premises, yet this will not preclude plaintiff from recovering the rental, unless you believe from the evidence that plaintiff took possession of said premises with the intention and purpose of releasing defendant from further liability on account of the rent."

The presiding judge thought that: "The question of intention can only arise where the landlord exercises such dominion over the vacated premises as may be consistent with the continuation of the tenancy. Thus, a landlord may enter the vacated premises for the purpose of guarding them from a threatened injury or to prevent waste, to abate a nuisance, or to make such repairs as would not interfere with the occupancy of the absent tenant, if he should return, but, where, as in the case of a dwelling, the landlord moves his own family into the premises, or puts another family in possession thereof, or makes repairs with a view of obtaining a higher rent, or where, as in this case, the vacated premises is a storeroom, he moves his own merchandise into the room and continues to occupy it for his own convenience and profit, such occupancy is inconsistent with the notion that he is not holding possession of the premises in his own right and adversely to the former tenant." * * * But my associates on the authority (citing a number of cases) are of the opinion that plaintiff's intention was a question of fact for the jury."

Here, at least, however, was a complete abandonment, or, at least, a departure from the premises, and this is only the class of cases we are here concerned about, and the presiding judge makes it very plain, that he does not agree that there was any question of fact involved, but a question of law for the court. Looking at the Missouri cases on which the other judges based

their opinion that here was merely a question of fact, and we doubt whether they extended as far as the ruling in the *Sander* case. Only one of them was a Supreme Court case, and all that appears there that a few days after the abandonment "persons were seen making repairs about the house." *Livermore & Cooley v. Eddy*, 33 Mo. 547. Is the *Sander* case virtually equivalent to a ruling that every case of this kind is a jury case? It must be thought it approaches very nearly to such a holding.

Ledsinger v. Burke, 113 Ga. 74, cites cases which show there is a rule of law which makes it the duty of courts to say what circumstances show as a matter of law a resumption by the landlord of possession inconsistent with a continuance of the lease. The facts there showed a renting by the year; a request for a release and refusal thereof; a vacating by the tenant; a request afterwards by the landlord's agent for the keys; the placing of a rent card on the house and efforts to rent the house. The court held that thereby the landlord "resumed the exclusive possession and control of the premises, which was entirely inconsistent with a continuance of the relation of landlord and tenant" between the parties.

But the presumption arising from what was done by the landlord in the Georgia case seems quite the other way in an Illinois case. Thus in *West Side Auction Co. v. Conn. Ins. Co.*, 186 Ill. 156, the facts show the lessee sent to lessor's agents the keys, and they wrote back refusing to accept surrender of the lease. After this surrender and retention of the keys, lessor put out rent signs and cleaned up the building. There was no notice that this attempt to rent was on the tenant's account.

The court said: "Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and if it could, relet them, thus reducing the damages for which the lessee was liable."

Now, to keep these two cases from being in conflict one would have to say it was because the landlord sent for the keys. But that ought not to be considered an essential difference. The tenant ought to have done that to give his abandonment the full semblance of good faith, and it was his duty to correspond to the landlord's duty in regard to preservation of the property, and so far as realizing anything out of the property was concerned, that was a step in his interest. We do not think if a man abandons a house, that the landlord ought to have it ready for his immediate return, when he is the only party who has attempted to repudiate the contract. Continuous occupancy is indeed one among the means for the preservation of property, and to keep it up to its fair market value. The case of *Apartment House Co. v. Dofoe*, 78 Minn. 268, shows a renting from month to month; a notification of two weeks (the statute requiring 30 days), an acceptance of one-half a month's rent and a receipt for that time; an acceptance without objection of the keys without any objection; and immediate attempt to re-rent. The Minnesota Court was as positive as that of Georgia in declaring the opposite of what the latter court declared. Neither was wobbly on the question of intent, and of there being a question for the jury. That jury question theory

seems coming to be almost as wide a gate for judicial escapes as is the police power. Things are dumped more and more into these routes. Thus the courts are getting more and more indecisive.

The rule of acceptance of keys is about as fairly stated in 18 Am. & Eng. Encyc. of Law 364 as we remember to have seen: "The intention of the parties is controlling, and it must appear that the tenant delivered the keys to the landlord and he accepted them with the view of accomplishing a surrender. To this are cited numerous cases. But we would add to that by saying that this view ought to be established by a preponderance of the evidence, and it ought not to rest upon any supposed obligation of the landlord to manifest his intent at the time. The tenant proposing to abandon has no right to put the landlord to an immediate election of acceptance or rejection. The tenant having taken his course after deliberation, the landlord should be allowed the same privilege."

But the cases appear to require that the landlord should speak out, and notify the tenant he will still be held. See Woodward v. Lindsey, 43 Ind. 338; Thomas v. Steamship Co., 71 Me. 548; Lafferty v. Hawes, 63 Minn. 13; Ladd v. Smith, 6 Or. 316. This seems so as to merely sending the keys to office or house. Stewart v. Sprague, 76 Mich. 184; Scott v. Beecher, 91 Mich. 590; Blake v. Dick, 15 Mont. 236. But we do not perceive much force in any such distinction, as if it is the landlord to speak out if the keys were handed him, he ought to also, if they are left for him at his office or home. If he is not obliged to speak out, why should he if they are handed him?

It seems to us the landlord should be entitled to be compensated for loss if a tenant is attempting by abandonment to repudiate his contract, and to use his property in a reasonable way on the theory that both he and the tenant would be eventually saved from loss. In almost all other contracts the obligation arising out of a breach is to make good the loss. We seem to be tangled by old technicality. C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Adulteration—Mixture of Chicory and Coffee.—The appellants were summoned for selling to the prejudice of the purchaser coffee adulterated with 74 per cent. of chicory. It was proved that an inspector on asking for half-a-pound of coffee was supplied, at the price of 11d., with half-a-pound of a mixture of which 74 per cent. was chicory and 26 per cent. was coffee, and with two coupons entitling him to certain other articles. The article sold was labeled "Coffee Mixture," with the words "Sold as a mixture of chicory and coffee," in small print. The inspector's attention was not drawn to the label prior to the sale. The magistrates held that the offense charged had been com-

mitted, and that as in their opinion the chicory had been added fraudulently to increase the weight and bulk of the article sold, the label afforded no protection to the appellants. Affirmed.—Star Tea Company, Limited v. Neale, K. B. (Oct. 18, 1909).

Mistake—Payment Under Mistake of Fact—Liability to Refund.—The plaintiff entered into an agreement with K. & Co., of New York, whereby the latter agreed to honor the drafts of a Mexican company up to £500, the plaintiff, who required a standing credit, agreeing to recoup K. & Co. by paying £500 into their account with the defendants on advice that the credit given by K. & Co. to the company was nearly exhausted. On the 30th of October, 1907, the plaintiff received advice from K. & Co. that they had credited the company with £500, and requested him to pay that amount to the credit of their account with defendants. On the 31st of October the plaintiff paid the £500, as requested, and subsequently, on finding that K. & Co. had suspended payment on the 30th of October, applied to the defendants for repayment of the £500. The defendants, who meanwhile had done no more than enter the receipt of the £500 in their books, claimed to retain that sum in reduction of K. & Co.'s indebtedness to them. Held, that as the £500 had been paid under a mistake as to the true position of affairs, and merely in anticipation of a legal liability, the plaintiff was entitled to recover.—Kerrison v. Glyn, Mills, Currie, & Co., K. B. (Oct. 28, 1909).

Public Health—Alteration of Old Building.—The respondent was summoned for failure to give notice to the borough surveyor of his intention to erect a new building; for erecting it with materials different from those prescribed by the by-laws; and for failing to provide an open space at the rear as required by the by-laws. It was proved that the respondent was the occupier of a three-sided shed at which he carried out the following works: The roof had been stripped and constructed in a different manner, certain brick piers had been raised, wooden props had been replaced by iron columns, the wooden walls on two sides had been replaced by iron, and a new end wall had been erected. Of the old building there only remained the wooden principals of the roof, portions of the brick piers and a boundary wall. The justices held that the provisions of the Public Health Act, 1875, and of the by-laws did not apply to the building, as it was not a new building within the meaning of the Act and by-laws, and they dismissed the summons. Held, that there being no facts which could fairly give rise to the suggestion that this was not a new building, the respondent ought to have been convicted.—Lee v. Barton, K. B. (Oct. 18, 1909).

Will—Trust to Convert Realty.—Mere lapse of time without conversion being effected, if unexplained, coupled with slight reasons for permanent retention as land, may give rise to the inference that it was the intention of the person absolutely entitled to a remainder the subject of a trust for conversion to retain such remainder unconverted.—Smith v. Gumbleton (Nov. 18).

JETSAM AND FLOTSAM.

COMPETITION FOR DIVORCE CASES IN SAN FRANCISCO.

In many large cities the competition for divorce business is very keen, among a certain class of the population who call themselves lawyers. A few Sundays ago the San Francisco Examiner contained the following classified advertising:

ATTORNEYS:

AAA—Divorce; costs \$12; quick, quiet; advice free; no charge unless successful. Open every evening. 1028 Market st., room 12.

ADVICE FREE: DIVORCES cheap, quiet, quick; established 25 years; open evenings.

LEGAL ASSOCIATION,
1633 FILLMORE st., between Geary and Post.

A quick, quiet, complete divorce for \$20; courteous square dealing; advice free; no fee until successful; open Thursday eves. 1112 Market st., room 122.

AAA—Quick, quiet, complete divorce, \$15; advice free; see me first, save money. 607 Westbank bldg., 830 Mkt.

ADVICE free, plain facts as to strength of any case; always successful; low fee; divorce costs \$12. 419 WESTBANK BLDG., 830 Market st.

DIVORCE costs \$10; quick, quiet, advice free; always successful; mod. charge for drawing legal papers; divorce our specialty. 262 Pacific bldg.

A glance at this extravagant, wild-eyed competition would lead anyone to believe that divorces were granted in the private offices of certain self-styled lawyers rather than in a court of justice.

Such quackery in legal advertising should be suppressed as fraudulent.

The use of such a word as "quick" is fraudulent on its face as well as a reflection on the courts. No lawyer has an inside track in having his cases set ahead of their proper order, unless he is improperly tampering with the administration of justice.

The use of the word "quiet" merits the same condemnation. In some states it has been held such an objectionable reflection on the integrity of the courts as to be sufficient ground of disbarment. *People v. Goodrich*, 79 Ill. 148; *People v. McCall*, 18 Colo. 186, 83 Pac. 28.

In behalf of the fair name of the profession, bar associations in every large city should strive to stamp out such objectionable practices. It is to be expected that both the courts and the legislature will lend their assistance to such endeavor.

In many states the bar have succeeded in having laws passed making it a misdemeanor to publish any advertisement soliciting divorce cases. Such statutes are quite effective, and are justified under the police power on the ground that such advertising endangers the public morals in undermining the marriage relation.

RAILWAY COMPANY AND UNPROTECTED GOODS.

In *Sutcliffe v. The Great Western Railway Company*, the court of appeal had last week to decide a question of great importance to railway companies—viz., whether when goods are peculiarly liable to damage if not packed, they may refuse to carry them, otherwise than at "owners' risk," when not protected by packing. The right of a railway company, unless they are carrying as common carriers, to restrict their liability when the goods are not packed can hardly be questioned, and in this case there was a special contract signed by the consignor of the goods. But a difficult point involved in this case was whether the conditions imposed by this contract were not void under the Railway and Canal Traffic Act, 1854, as being unreasonable. It was agreed that the effect of the words "owners' risk" was that the company were not liable except for willful misconduct, a restriction of their liability which might take effect in a case of loss in no way caused by the want of packing and the same rate was charged as where the goods were packed and carried at the company's risk. Nevertheless, the court held that the conditions on which the goods were carried were reasonable; but it is hardly surprising that on this point, involving, as the elaborate judgments show, many considerations, they were not unanimous. Lord Justice Vaughan Williams holding that the special contract was void and that the company were fixed with the ordinary liability of common carriers.—45 London Law Journal, 2.

JUDICIAL DELAY IN ENGLAND.

There is so much adulation over English practice in the matter of promptness in the disposition of legal business that it makes us feel good to know that English judges are also human and fall so far behind their dockets as to call forth protests from the bar. A commission appointed to examine into the delays of the King's Bench have reported and we observe the following reference to such report in the London Law Journal of January 10, 1910:

"The publication of the Report of the Joint Committee on the King's Bench Division, recommending the immediate appointment of two additional judges, has been followed, with reasonable despatch, by the publication of the minutes of evidence on which that recommendation was based. So strong was the evidence in favor of an increase in the judicial staff that the committee did not shrink from differing from the Lord Chancellor, who informed them at the beginning of the inquiry that there 'was not a case for making new judges.' The evidence of the Lord Chief Justice was, indeed, overwhelming. In ten years, from 1900 to 1909, the actions for trial at the commencement of the Michaelmas Sittings have risen from 615 to 795, and the Divisional Court cases from 124 to 224. Much was said by some of the witnesses about reforming the circuit system and shortening the Long Vacation. A considerable

amount of time, no doubt, could be saved in these two directions, but the Committee had to deal with the notorious delays in the King's Bench Division—delays impairing the prestige and efficiency of the administration of justice—and they did the obviously wise thing in seeking an immediate remedy for so pressing an evil."

BOOK REVIEWS.

AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW AND PRACTICE, VOL II.

At 69 Cent. L. J. 399, we had the pleasure of noticing at sufficient to indicate what is being sought by the publishers of their new series of volumes under the above title. The second volume in that series has come to our table.

The plan in our former notice is fulfilling the expectation held out by the purchasers, as to which, however, no doubt was ever entertained. This second volume begins with "Admissions" and extends to "Alibi." Intermediately are treated many subjects of great importance, for example, such as Admissions and Declarations; Advancements; Adverse Possession; Affidavits; Affidavits of Merits or Defense; Agency; Agistment and Agreed Case.

As an example of exhaustiveness in treatment we refer to "Agency," which is divided into eleven general heads, with minute subdivisions and subheads thereunder, the text and notes covering nearly five hundred pages.

The distinction between this work and the well known series on Laws and that on Practice, both American and English, was attempted to be stated in our former review, and also the excellence of the volumes as examples of the printer's art.

Published by the Edward Thompson Company, Northport, Long Island, N. Y.

AMERICAN STATE REPORTS, VOL 128.

In addition to the regular brief annotations which follow after all cases published in the above reports, we find several exhaustive monographic notes by Mr. A. C. Freeman. Thus to Bank v. Newman, reported at page 81, is such a note under the title "Actions maintainable on Bank Checks;" to McCarthy v. Crawford, page 94, one on "Receivers' Certificates;" to State v. Leslie, page 160, one on "Malicious Mischief;" to Howe's Ex'r v. Griffins Admr., page 296, on "Life Insurance in Favor of Persons Having No Insurable Interest;" to Banaghan v. Maloney, p. 378, on "When Specific Performance of a Valid Contract Will be Refused, the Refusal Not Being Because the Property is of any Particular Class;" to Donovan v. Griffith, page 458, on "Tenancy by the Curtesy, Nature and Existence of Estates of;" to Hughes v. Crooker, page 606, on "Parol Evidence of Conditions in Note and Bills;" to Blake v. Bank, page 684, on "Certified Checks;" to Car and Foundry Co. v. Water Co., at page 749, on "Subpoena Duces Tecum;" to Lumber Co. v. Alderman, at page 865, on "Deeds to Timber and Their Effect;" to Locomotive Co. v. Hoffman, at page 958, on "When a

Nuisance Will Support but one Recovery and When it May Support Several."

Thus it appears what is given specially in these reports other than the benefit in the judicious winnowing of the wheat from the chaff, with its clouds of dust to obscure the course of useful precedent.

The publisher of the reports is the old established house of Bancroft Whitney Company, San Francisco, Cal.

HUMOR OF THE LAW.

A subscriber in Southern Ohio favors the Ohio Law Bulletin with copies of subjoined correspondence which is self explanatory:

"MR. JOHN DOE."

"Dear Sir:—In reference to the probability of our being able to secure you a decree of divorce would say that we have carefully considered the statement of facts, etc., furnished our Mr. Blank, Jr., on 15th inst., and we regret to inform you that, in our opinion, the Judge of this judicial subdivision would not, upon said facts, grant you a decree on the grounds of extreme cruelty. Our total bill for the consultation and this opinion is \$25. which you will kindly remit.

BLANK & BLANK."

"BLANK & BLANK. Attya."

"Gents:—Replying to your able and learned opinion of the eighteenth. I beg leave to report that my wife opened and read said weighty legal document ahead of me and it may flatter you some to know that her views of my case coincide with yours in toto. Since said fortuitous event my said statement of facts has been visibly augmented by a blackened eye, a broken nose and a mutilated ear, all of which I am now carrying in a sling. I have taken the precaution to label these physical evidences of my domestic felicity as Exhibits A. B. and C. respectively, a precaution which I feel sure you would, in your wisdom, sanction. However, in view of what you infer as to the mental attitude of 'the judge of this judicial subdivision,' I fear that said tangible tokens above referred to might be construed by said mollycoddle dispenser of justice here below as mere domestic love taps, wholly lacking in those necessary legal elements constituting 'extreme cruelty,' as she is made and provided in this commonwealth. I therefore propose to give 'said facts' and causus belli the popular absent treatment and when this brief memorial reaches you I will be half way to Nevada, where, I am told, justice is both sure and swift.

"Regarding your modest little bill I am happy to inform you that the spouse of my late conubial bosom, bed and board is now, henceforth and forever the duly constituted and self appointed custodian and guardian of all the visible assets of our once joyous matrimonial co-partnership, and if you can persuade her to remit, either kindly or otherwise, you are welcome to the well-earned pittance, together with all accrued interest. With these said facts I now bid yourselves and the honorable judge of this judicial subdivision a fervent and permanent farewell.

Hopefully yours.

JOHN DOE."
—Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

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1. Accident Insurance—Extension of Terms of Policy.—The payment of an additional premium for a casualty policy, made on account of a report of wages of a class of employees not covered by the policy, does not extend the terms of the policy.—Maryland Casualty Co. v. Little Rock Ry. & Electric Co., Ark., 122 S. W. 994.

2. Adulteration—Watered Milk.—In a prosecution for having in possession, with intent to sell for human food, milk to which water had been added, in violation of a city ordinance, whether water had been added to the milk held under the evidence a question for the jury.—City of Seattle v. Erickson, Wash., 104 Pac. 1128.

3. Adverse Possession—Color of Title.—That an adjoining owner assessed land to himself and paid the taxes thereon held not to operate to defeat the effect of the adverse possession of one claiming the land under a deed.—Owsley v. Matson, Cal., 104 Pac. 983.

4.—Continuity of Possession.—That the fence by which an adverse claimant inclosed

land was occasionally broken by spring floods did not break the continuity of his possession.—McComb v. Saxe, Ark., 122 S. W. 987.

5. Animals—Liability of Owner.—A person taking a dog to a race track and permitting it to interfere with riders in a race held liable for injury to a rider thereby sustained.—McClain v. Lewiston Interstate Fair & Racing Ass'n, Idaho, 104 Pac. 1015.

6. Attorney and Client—Disbarment.—A disbarment proceeding under Wilson's Rev. & Ann. St. 1903, secs. 232-237, held a civil proceeding.—In re Biggers, Ok., 104 Pac. 1083.

7. Appeal and Error—Abstract of Record.—An abstract of record must not be constructed by commingling record entries and record proper with matter of mere exception in an undistinguishable mass, so that the appellate court is put to sorting out exceptions from record entries and record proper.—Kolokas v. Missouri Pac. Rv. Co., Mo., 122 S. W. 1082.

8.—Joint Trial.—Defendants in an escheat proceeding, having proceeded to a joint trial without objection, could not claim on appeal that they were entitled to a severance.—State v. McDonald, Or., 104 Pac. 967.

9.—Pleadings.—A motion to strike out part of the complaint as frivolous, irrelevant and redundant held not an "answer" within B. & C. Comp., sec. 548, precluding defendant from appealing from a judgment by default for want of an answer.—Multnomah County v. Faling, Or., 104 Pac. 964.

10.—Reasons for Decision.—A judgment will be affirmed, if it is right, even though the reason assigned for its rendition is wrong.—Kennedy v. Manry, Ga., 66 S. E. 29.

11.—Remanding for Dismissal.—A decree of a federal circuit court of appeals, after correctly deciding the court below was without jurisdiction, inadvertently affirmed the decree dismissing the bill on the merits, will be reversed by the United States Supreme Court, with directions to set aside the decree on the merits and sustain the demurrer and dismiss the suit.—McGilvra v. Ross, U. S. S. C., 30 Sup. Ct. 27.

12. Bail—Judgment.—Misrecitals in the judgment in scire facias on a forfeited bail bond held surplusage and immaterial.—Callaghan v. State, Tex., 122 S. W. 879.

13. Bankruptcy—Composition.—Except in case of fraud, a creditor of a bankrupt, who, knowing his debt is not scheduled, neglects to file his claim, takes the risk that a composition may be made and confirmed without his being included.—In re Abrams & Rubins, U. S. D. C. S. D. N. Y., 173 Fed. 430.

14.—Discharge.—That a corporation has been adjudged a bankrupt does not relieve stockholders of debts contracted as partners.—Virginia-Carolina Chemical Co. v. Fisher, Fla., 50 So. 504.

15. Bastards—Evidence as to Legitimacy.—Letters of an alleged father to his son, addressing him as his son, would be construed *prima facie* to refer to him as his legitimate son.—*State v. McDonald*, Or., 104 Pac. 967.

16. Benefit Societies—By-Laws.—A member of a fraternal benefit society could not be misled by the non-enforcement of the by-laws as to matters essential to constitute membership, where he did not know of their non-enforcement.—*Shartle v. Modern Brotherhood of America*, Mo., 122 S. W. 1139.

17. Bills and Notes—Burden of Proving Judgment.—In an action on a note executed to a decedent in which defendant pleaded payment, the production by defendant of receipts for money advanced, signed by decedent, would not of itself throw the burden of proving non-payment on plaintiff.—*Steltemeler v. Barrett*, Mo., 122 S. W. 1095.

18.—Transfer Without Endorsement.—Holders of a negotiable note payable to order, and not indorsed, hold it with notice of whatever equities the maker might have.—*Sublette v. Brewington*, Mo., 122 S. W. 1150.

19. Boundaries—Construction of Surveys.—Where nothing appears on the face of grants or from testimony to indicate that any other course was observed in making the surveys than true north and south lines, and the adoption of magnetic lines would lead to results inconsistent with calls of one of the grants, the true north and south lines should control.—*Barrera v. Guerre*, Tex., 122 S. W. 902.

20.—Establishment by Agreement.—An agreement between adjoining landowners fixing their boundary, executed either by a marked line or by actual possession, is notice to all the world of such boundary.—*Walker v. Cornett*, Ky., 122 S. W. 841.

21. Burglary—Possession of Stolen Property.—Unexplained possession of property recently stolen does not create a conclusion of law of guilt of accused.—*Thompson v. State*, Fla., 50 So. 507.

22. Carriers of Goods—Power of Legislature.—The legislature has full power to pass laws regulating the intrastate business of carriers.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co.*, Fla., 50 So. 509.

23. Carriers of Passengers—Care Required.—A street railway company held bound to exercise the same care as to equipment furnishing the motive power as it does in furnishing safe cars for passengers.—*Gardner v. Metropolitan St. Ry. Co.*, Mo., 122 S. W. 1068.

24.—Contributory Negligence of Passenger.—Act of a street car passenger in riding with a portion of his arm out of a window held not negligence *per se*, preventing a recovery.—*Gardner v. Metropolitan St. Ry. Co.*, Mo., 122 S. W. 1068.

25.—Forfeiting Rights of Passenger.—A mother, who refuses to pay proper fare for her son and forcibly resists his eviction, forfeits her rights as a passenger and is only entitled to ordinary care by the carrier for her safety.—*Williamson v. Chicago, R. I. & G. Ry. Co.*, Tex., 122 S. W. 897.

26.—Injury to Passenger on Freight Train.—A passenger on a freight train did not assume the risk of any unusual and unnecessary jolting, resulting from the negligence of train operatives.—*Louisville & N. R. Co. v. Campbell*, Ky., 122 S. W. 848.

27.—Injuries to Stockman.—A carrier held not liable for an injury to a stockman staying in the stock car instead of in the caboose.—*Fusselman v. Wabash R. Co.*, Mo., 122 S. W. 1137.

28. Champerty and Maintenance—Champtorous Agreements.—Though a champtorous agreement to sell land is void under the statutes, the cause of action which is the subject of the champtorous agreement is not thereby destroyed.—*Keeney v. Waters*, Ky., 122 S. W. 837.

29. Chattel Mortgages—Transfer of Mortgaged Property.—Transfer of a portion of a tenant's mortgaged crop to a landlord in settlement for rent and a claim for supplies held not an offense, unless fraudulent or collusive.—*Ham v. State*, Ga., 66 S. E. 22.

30. Constitutional Law—Due Process of Law.—An ordinance declaring a brickyard a nuisance held to take property without due process.—*City and County of Denver v. Rogers*, Colo., 104 Pac. 1042.

31.—Equal Protection of Law.—The permission given by Act No. 178, p. 250, of 1908, to lighting and electric railway companies and the department of police and public buildings of New Orleans to employ electricians without a license, while others have no such right, held a denial of the equal protection of the laws.—*State v. Gantz*, La., 50 So. 524.

32.—Right to Acquire and Protect Property.—The constitutional right of acquiring and protecting property held not infringed by valid governmental regulations of the use of property employed in a public service.—*King Lumber Mfg. Co. v. Atlantic Coast Line R. Co.*, Fla., 50 So. 509.

33.—Taxation.—The legislature cannot delegate its power; and power to fix the tax rate, being legislative cannot be delegated.—*State v. State Board of Examiners*, Mont., 104 Pac. 1055.

34. Contracts—Marriage Brokerage Contracts.—Parties to a contract of marriage brokerage held not in *pari delicto*, and the party paying a consideration under the contract held entitled to recover the same.—*Wenninger v. Mitchell*, Mo., 122 S. W. 1130.

35. Copyrights—Infringement.—The copyright notice printed in a periodical held not to have been on the "title page" or the page following, within the requirements of Act June 18, 1874, c. 301, to entitle the publisher to maintain an

action for infringement.—Freeman v. The Trade Register, U. S. C. C. N. D. Wash., 173 Fed. 419.

36. Corporations—Right to Defend Action.—Where, at the time a corporation was sued, it had not failed to pay its franchise tax, a condition precedent to its right to do business in the state, it would not be deprived of the right to defend the action by afterwards failing to pay such tax.—J. T. Stark Grain Co. v. Harry Bros. Co., Tex., 122 S. W. 947.

37.—Rights of Purchaser of Assets.—Purchaser of assets of a corporation sold for value and in good faith held to take them discharged of any trust in favor of the creditors of the selling corporation.—Warren v. Mayer Fertilizer & Junk Co., Mo., 122 S. W. 1087.

38. Courts—Appointment of Temporary Keeper of Property.—A suspensive appeal will not lie from an order appointing a provisional keeper of succession property pending a contest over the appointment of an administrator.—Succession of Pavey, La., 50 So. 518.

39.—Constitutional Questions.—Where the judges of the Supreme Court are not agreed on a constitutional question, the judges of the circuit courts will be called to the assistance of the Supreme Court to hear and determine the case.—Carolina, C. & O. Ry. Co. v. McCown, S. C., 66 S. E. 1.

40. Covenants—Damages for Breach.—In an action for breach of a covenant to convey fee-simple title, attorney's fees and necessary reasonable expenses and proper court costs held allowable.—Pineland Mfg. Co. v. Guardian Trust Co., Mo., 122 S. W. 1133.

41.—Warranty of Fee Simple Title.—Where a vendor attempts to convey land with a covenant for fee-simple title when he has no legal title whatever, held, that the covenantee may sue on the covenant when he has suffered substantial damages, though there has been no eviction.—Pineland Mfg. Co. v. Guardian Trust Co., Mo., 122 S. W. 1133.

42. Criminal Evidence—Admissibility.—The state held authorized to prove by a witness the position of the body of decedent, without first showing that it had not been disturbed.—Welch v. State, Tex., 122 S. W. 880.

43.—Articles Taken from Possession of Accused.—Articles taken from the dwelling of one accused of crime, tending to connect him with it, may be submitted to the jury.—Union v. State, Ga., 66 S. E. 24.

44.—Former Conviction.—In a larceny prosecution, the court records showing accused's former conviction for larceny and the state penitentiary records showing her service of sentence and discharge, were competent to impeach accused's testimony.—State v. Payne, Mo., 122 S. W. 1062.

45. Criminal Law—Appeal by State.—The state cannot appeal from a judgment for accused, unless a right of appeal is given by statute.—State v. Craig, Mo., 122 S. W. 1006.

46.—Necessity of Exceptions.—To take advantage, on appeal, of insufficient proof of venue, the matter must be preserved by bill of exceptions, except where the issue is fought out on the trial as to whether the offense was in the county where the venue was laid, when it will be noticed without bill of exceptions.—Munger v. State, Tex., 122 S. W. 874.

47.—Statute of Limitations.—Limitation does

not begin to run against a prosecution for conspiracy between officers of a national bank to embezzle, abstract, or willfully misappropriate its funds so long as the conspiracy continues or acts to effect the object of the conspiracy are committed.—United States v. Breese, U. S. C. C. W. D. N. Car., 173 Fed. 402.

48.—Competency of Witness.—Failure of the court to make preliminary examination of a child, who was objected to as a witness because too young, held not reversible error.—Webb v. State, Ga., 66 S. E. 27.

49.—Effect of Appeal.—If the same legal questions happen to be involved in several separate cases against the same accused, pendency of an appeal in one of the cases does not deprive the trial court of jurisdiction of the other cases.—State v. Rose, La., 50 So. 520.

50.—Election of Remedies.—Plaintiff, having selected one of two or more inconsistent remedies, cannot adopt a course inconsistent with the remedy first selected.—Kennedy v. Manry, Ga., 66 S. E. 29.

51.—Harmless Error.—Charge that burden was on defendant to raise a reasonable doubt as to whether he knew what he was doing, and whether it was right or wrong, held not reversible error, in view of another portion of the charge.—Johnson v. State, Fla., 50 So. 529.

52.—Judicial Notice.—The court knows judicially that in Texas a marriage between a white man and negro woman could not be had.—Munger v. State, Tex., 122 S. W. 874.

53. Customs and Usages—As Part of Contract.—A well-established custom of the trade to which a contract relates enters into and becomes a part of it when the custom is known and understood by the parties and the contract is made with reference to it.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co., Ky., 122 S. W. 852.

54. Customs Duties—False Entry.—An employee in the customs service who returns false weights with an entry of imported merchandise is within the words "other person" in the customs administration act.—United States v. Messcall, U. S. S. C., 30 Sup. Ct. 19.

55. Damages—Election.—Where plaintiff elects to sue for breach of contract, and not for a penalty provided in the contract, the amount of damages is not limited to the penalty.—Sherman v. Gray, Cal., 104 Pac. 1004.

56.—Impairment of Earning Capacity.—Though a minor cannot recover for impaired earning capacity prior to majority, evidence may be offered of his earning capacity to aid the jury in estimating the damages to accrue after majority.—McClain v. Lewiston Interstate Fair & Racing Ass'n, Idaho, 104 Pac. 1015.

57.—Matured Crops.—Where a matured crop is destroyed, the crop is treated as personal property and the measure of damages is the market value of the crop standing on the ground.—Adam v. Chicago, B. & Q. Ry. Co., Mo., 122 S. W. 1136.

58. Deeds—Acceptance.—It is presumed where a conveyance is made to a person without his knowledge, and which is to his benefit, that he accepts it.—Garten v. Trobridge, Kan., 104 Pac. 1067.

59. Depositions—Certificate of Officer Taking.—The certificate of the officer taking depositions on written interrogatories propounded under the general statute need not show that the witnesses were first cautioned and sworn

to testify to the truth, notwithstanding the statute.—*Wisegarver v. Yinger*, Tex., 122 S. W. 925.

60. Divorce—Custody of Children. — That plaintiff, a divorced woman, spent two nights at a hotel with her present husband before her marriage to him, held not to show that she was so depraved as to be unfit to retain the custody of an 11-year-old daughter of the former marriage.—*Knepper v. Knepper*, Mo., 122 S. W. 1117.

61. Easements—An implied Right of Passage. — An implied right of passage cannot exist, where a special passage has been fixed by contract.—*Baldwin Lumber Co. v. Todd*, La., 50 So. 520.

62. Elections—Proposition to Borrow Money. — Where a proposition to borrow money is submitted to the people, the object to which the borrowed money is to be appropriated is an integral part of the proposition.—*State v. Gordon*, Mo., 122 S. W. 1008.

63. Electricity—Action for Damages. — Where electric light fixtures had been used for years and accepted by defendant electric light company, held, that it could not insist in an action against it for setting fire to the dwelling that the fixtures were defective.—*Hanton v. New Orleans & C. R. Light & Power Co.*, La., 50 So. 544.

64. Eminent Domain—Compensation. — The measure of damages for land taken is its market value in view of all the purposes to which it is adapted, and while evidence that it is "valuable" for particular purposes is admissible, its money value for any particular purpose cannot be shown in determining its market value.—*Sacramento Southern R. Co. v. Heilbron*, Cal., 104 Pac. 979.

65. Equity—Decree. — Where there are a number of adult defendants, some served, others proceeded against by publication, a decree reciting the appearance of the adult defendants without naming them includes only those served with process.—*White v. White*, W. Va., 66 S. E. 2.

66. Escheat—Pleading. — Under Act Feb. 19, 1903 (Laws 1903, p. 127) sec. 4, an information to escheat property of the decedent was not demurrable, as misjoining two causes of action, because averments relating to the personality and real estate were separately alleged.—*State v. McDonald*, Or., 104 Pac. 967.

67. Evidence—Books of Account. — A ledger to which items of account had been transferred from other books and memoranda is not admissible as a book of original entries.—*San Francisco Teaming Co. v. Gray*, Cal., 104 Pac. 999.

68.—Declarations of Intestate. — Declarations affecting pedigree, are incompetent, unless the declarant, or the source of the witness's information, was a member or related to the family whose history the fact concerns.—*State v. McDonald*, Or., 104 Pac. 967.

69.—Foreign Death Records. — Under B. & C. Comp., sec. 755, subd. 8, providing for the certification of official foreign records, the certificate is to be made in accordance with the law of the place of the record.—*State v. McDonald*, Or., 104 Pac. 967.

70.—Judicial Notice. — The court takes judicial notice of geographical subdivisions of the state, and of state and federal boundaries.—*Cator v. Hays*, Tex., 122 S. W. 958.

71. Executors and Administrators—Claims. — A

judgment establishing a claim against the estate of a deceased widow held res judicata in proceedings to charge the estate of the deceased husband, leaving a will disposing of his property after the payment of the widow's debts.—*Pierce v. Pierce*, Mo., 122 S. W. 1147.

72. Federal Courts—Federal Questions. — A claim by a railroad in a state court of immunity from liability for negligently killing an employee in New Mexico because of non-compliance with the requirements of the statute of that territory presents a federal question.—*El Paso & N. E. Ry. Co. v. Gutierrez*, U. S. S. C. 30 Sup. Ct. 21.

73.—Jurisdiction of Cross-Bill. — If a cross bill in a federal court assumes the character of an original bill, it will be dismissed for want of jurisdiction, where the parties to the controversy presented thereby are citizens of the same state.—*Patton v. Marshall*, U. S. C. C. of App., Fourth Circuit, 173 Fed. 350.

74. Fire Insurance—Action for Damages. — Where the owner of property burned has been paid part of his loss by an insurer, an action against the wrongdoer for the value of the property held properly brought in the name of insured, and insurer not a necessary party.—*Hanton v. New Orleans & C. R. Light & Power Co.*, La., 50 So. 544.

75. Fraud—Measure of Damages. — In an action for deceit in exchange of property the measure of damages was the difference between the actual value of the land received and what it would have been worth had it been as represented.—*Hawman v. McLean*, Mo., 122 S. W. 1094.

76. Frauds, Statute of—Parol Rescission of Contract. — Though a contract is required by statute to be in writing, it may be rescinded by parol.—*Keeney v. Waters*, Ky., 122 S. W. 837.

77.—Verbal Agreement as to Boundaries. — A verbal agreement between adjoining landowners fixing the boundaries so as to avoid litigation is not within the statute of frauds.—*Walker v. Cornett*, Ky., 122 S. W. 841.

78. Guardian and Ward—Title of Guardian. — The property of a ward is not vested in the guardian; but, in the absence of an express trust, the title thereto remains in the ward, and his title cannot be disturbed without his being a party to the suit involving the issue.—*Sellert v. McAnally*, Mo., 122 S. W. 1064.

79. Habeas Corpus—Review of Extradition Proceedings. — The objection that an extradition requisition contains a clause that the demanding state will not be responsible for any expenses held not available to accused on habeas corpus, but is a matter for the consideration of the executive of the surrendering state.—*Marbles v. Creecy*, U. S. S. C. 30 Sup. Ct. 32.

80.—Validity of Commitment. — An order of commitment for trial before the district court, issued by a magistrate upon a preliminary examination, held not a process issued on any final judgment within Wilson's Rev. & Ann. St. 1903, sec. 4867, forbidding a court or judge to inquire into the legality of any process whereby a party is in custody.—*Ex parte Turner*, Ok., 104 Pac. 1071.

81. Homicide—Admissibility of Evidence. — Where it was shown that the body of decedent, when seen, by a witness, had been practically undisturbed, it was not error to permit the witness to prove the position of the body.—*Welch v. State*, Tex., 122 S. W. 880.

82. Husband and Wife—Contract of Separation.

tion.—A contract between husband and wife agreeing to live apart, and disposing of the custody of the children, held not binding on the courts.—*Knepper v. Knepper*, Mo., 122 S. W. 1117.

83.—Wife as Surety.—It is competent for a wife to mortgage her lands to secure her husband's debt, and, when she does so, she stands in the relation of a surety for him.—*Jones v. Edeman*, Mo., 122 S. W. 1047.

84. Indictment and Information—Indorsement Nunc Pro Tunc.—Gen. St. 1906, sec. 3882, authorizes informations to be filed in vacation, and an omitted file mark may by order of court be placed upon an information nunc pro tunc, when the facts warrant it.—*Johnson v. State*, Fla., 50 So. 529.

85. Injunction—Election Officers.—Equity has no power to enjoin election officers from issuing a certificate of election, even though there was fraud in the election.—*Adcock v. Houk*, Tenn., 122 S. W. 979.

86.—Pleading.—A petition for an injunction, though containing no allegation that the threatened wrong will result in irreparable injury, and that petitioner has no legal remedy, is sufficient in the absence of special exception.—*Mitchell v. Burnett*, Tex., 122 S. W. 937.

87. Internal Revenue—Oleomargarine Dealers.—A corporation is a "person" within 32 Stat. 193, requiring dealers in oleomargarine to keep certain books, and providing for the punishment of any person willfully violating any of the provisions of this section, though section 5 applies in express terms to corporations.—*United States v. Union Supply Co.*, U. S. S. C., 80 Sup. Ct. 15.

88. Interpleader—Conflicting Claims to Rent.—Where conflicting claims are made of a lessee for rent, he has the right to interplead the parties.—*Spangler v. Spangler*, Cal., 104 Pac. 995.

89.—Costs and Fees.—A life insurance company which in good faith files a bill of interpleader against adverse claimants to the proceeds of a policy and pays the money into court is entitled to its costs and counsel fees from the fund.—*Mutual Life Ins. Co. of New York v. Farmers' & Mechanics' Nat Bank of Cadiz*, Ohio, U. S. C. C., S. D. Ohio, 173 Fed. 390.

90. Interstate Commerce—Intoxicating Liquors.—An interstate shipment of intoxicating liquor cannot be confiscated under Enforcing Act (Sess. Laws 1907-08, p. 605, c. 69), art. 8, secs. 6, either before or after removal from the carrier's premises, if intended for the personal use of consignee or his family.—*State v. Eighteen Casks of Beer*, Ok., 104 Pac. 1093.

91.—Judicial Notice.—Courts will take judicial notice that trunk line railroads are engaged in both intrastate and interstate traffic.—*Shohoney v. Quincy, O. & K. C. Ry. Co.*, Mo., 122 S. W. 1025.

92.—Regulation of Carriers.—Gen. St. 1906, secs. 2864, 2865, 2866, requiring a carrier to equip its cars furnished to haul lumber with supports sufficient to keep it firmly in place, held not to constitute a burden upon interstate commerce.—*King Lumber & Mfg. Co. v. Atlantic Coast Line R. Co.*, Fla., 50 So. 509.

93. Intoxicating Liquors—Gift to Minor.—A person can be convicted of giving intoxicating liquors to a minor, regardless of whether the local option law was in force in the county.—*Ex parte Cassens*, Tex., 122 S. W. 888.

94.—Persons Responsible.—Proprietor of a joint could not escape responsibility for a sale of liquor by his barkeeper because not present when made.—*Cox v. State*, Okl., 104 Pac. 1074.

95. Judgment—Pleading or Process to Sustain.—A default judgment entered on a cross-plea against co-defendants would not be sustained on writ of error, in the absence of a showing in the record of an appearance of the co-defendants, or of service on them aside from recitals in the judgment.—*Mayhew & Co. v. Harrell*, Tex., 122 S. W. 957.

96.—Full Faith and Credit.—A deed to land in Nebraska made by a commissioner under decree of court of another state in an action of divorce, in which, according to the practice in that state, the land was set apart to the wife as her separate property, need not be recognized in Nebraska, under the full faith and credit clause of the Constitution.—*Fall v. Eastin*, U. S. S. C., 30 Sup. Ct. 3.

97.—Pleadings.—The rule that, to render evidence available in support of a defense based on matters of estoppel, such matters must be pleaded, held not to apply to the statement of a cause of action by plaintiff.—*Ahlers v. Smiley*, Cal., 104 Pac. 997.

98.—Res Judicata.—To support a plea of res judicata, held, that there must be identity of cause of action and of the parties to the action.—*Virginia-Carolina Chemical Co. v. Fisher*, Fla., 50 So. 504.

99. Jury—Insanity of Juror.—Where, pending prosecution for homicide, a juror became insane, the court should begin the trial de novo, tendering to defendant the right to exercise all the peremptory challenges allowed him by law.—*Dennis v. State*, Miss., 50 So. 499.

100. Justice of the Peace—Pleadings.—A defendant in justice's court need not file a written pleading; but, where he does, he is bound by the allegations thereof.—*Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co.*, Tex., 121 S. W. 972.

101. Landlord and Tenant—Estoppel to Deny Title.—The fact that a tenant placed improvements on the premises held not to give him a right to repudiate a later lease, on the ground that the landlord did not own the premises.—*Fitchett v. Henley*, Nev., 104 Pac. 1060.

102.—Relation.—A provision of a deed absolutely conveying land held not to create the relation of landlord and tenant between the grantor and grantee, upon the latter's default in payment of a purchase-money note.—*Levy v. McDonnell*, Ark., 122 S. W. 1002.

103.—Renewal of Lease.—Where a lease provides for an extension of term at the option of the lessees, and one of the lessees assigns his interest to the other lessee, the latter may exercise the option.—*Spangler v. Spangler*, Cal., 104 Pac. 995.

104. Larceny—Evidence.—Where larceny of money is at issue, evidence that defendant had no money before and considerable money after the larceny is admissible.—*Thompson v. State*, Fla., 50 So. 507.

105. Limitations of Actions—Demurrer Raising Defense.—A defendant may take advantage of limitations by demurrer, when the face of the petition shows the bar to be complete.—*Pine-land Mfg. Co. v. Guardian Trust Co.*, Mo., 122 S. W. 1138.

106. Livery Stable Keepers—Contributory

Negligence.—In an action against a hirer of a livery team for negligently overdriving the team, the failure to charge on the issue of contributory negligence held erroneous.—*Edwards v. Adams*, Tex., 122 S. W. 898.

107. **Mandamus.**—Enforcement of Ministerial Duties.—Under Acts 29th, Leg. 1905, p. 285, c. 124, sec. 89, the appointment of a census trustee by the county superintendent of public instruction is a ministerial duty, which may be enforced by mandamus.—*Crow v. Falls*, Tex., 122 S. W. 933.

108. **Master and Servant.**—Discharge of Servant.—“Further employment” offered to discharged railroad employees in order to constitute a defense to a penalty imposed by Kirby’s Dig. sec. 6649, amended by Acts 1905, p. 537, must be employment of the same class and kind and in the same locality in which the wages sued for were earned.—*St. Louis, I. M. & S. R. Co. v. Bryant*, Ark., 122 S. W. 996.

109. **Negligence.**—The use of a Leeds coupler, which did not comply with the standard prescribed by the safety-appliance act of Congress, did not constitute negligence per se, unless it was not reasonably safe.—*Shohoney v. Quincy, O. & K. C. Ry. Co.*, Mo., 122 S. W. 1025.

110. **Tender of Wages.**—A tender of wages and interest due discharged railroad employees without accrued penalty held not to bar the employees’ rights to recover the penalty so accrued under Kirby’s Dig., sec. 6649, amended by Acts 1905, p. 537.—*St. Louis, I. M. & S. R. Co. v. Bryant*, Ark., 122 S. W. 996.

111. **Mines and Minerals—Conflicting Locations.**—A quartz location, laid out over a prior quartz location, does not initiate any right to a claim in so far as the boundaries of the two locations conflict.—*Strickland v. Commercial Mining Co.*, Cal., 104 Pac. 965.

112. **Contract to Sell.**—Under the terms of a contract to sell mining claims, held that equity would not require the vendor to repay whatever the purchaser had expended in annual assessment work before permitting him to rescind the contract.—*Ferguson v. McGuire*, Idaho, 104 Pac. 1028.

113. **Intention to Convert.**—Wrongful taking of ore of another, in absence of all other evidence, raises the presumption that it was taken intentionally, willfully, or in reckless disregard of the rights of the owner.—*Central Coal & Coke Co. v. Penny*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 340.

114. **Money Lent—Payment.**—One year was a reasonable time for the repayment of money loaned to be repaid by defendant “when convenient, or when business picked up.”—*Samuels v. Larimore*, Cal., 104 Pac. 1001.

115. **Municipal Corporations—Liability for Negligence.**—Persons employed in a city hall in managing and conducting the affairs of the municipality are public officers, charged with the performance of public duties, so that the doctrine of respondeat superior does not apply to such employments.—*Schwalk’s Adm’r v. City of Louisville*, Ky., 122 S. W. 860.

116. **Notice of Injury.**—Rev. St. 1899, sec. 5724 (Ann. St. 1906, p. 2909), relating to notice of injury on a defective sidewalk, held satisfied where the notice given will enable the city officers to locate the defect causing the injury.—*Snuckles v. City of St. Joseph*, Mo., 122 S. W. 1122.

117. **Nuisances.**—A city charter held not to

warrant an ordinance arbitrarily declaring a brickyard within 1,200 feet of a residence, or public school, or city park, a nuisance.—*City and County of Denver v. Rogers*, Colo., 104 Pac. 1042.

118. **Street Improvement.**—The questions whether a street improvement was made in accordance with the contract and at a reasonable price, and was an improvement enhancing the value of the property assessed, are not open to inquiry, in an action on special tax bills.—*Fruin v. Meredith*, Mo., 122 S. W. 1107.

119. **Street Improvements.**—If, under a city charter, silent as to charges against street railways for paving, the council imposes such a charge, held, that an abutting owner is not entitled to an abatement therefrom from the amount with which he is chargeable.—*Hager v. Melton*, W. Va., 66 S. E. 13.

120. **Taxation.**—Where a city could not legally demand a franchise tax until after the commencement of the action therefor, by the passage of an ordinance authorizing it, interest on the tax before judgment is not recoverable.—*City of Columbus v. Bank of Columbus*, Ky., 122 S. W. 835.

121. **Negligence—Presumption.**—An accident from an act of such a character that when due care is taken no injury ordinarily ensues, will be presumed to be negligent.—*Pratt v. Missouri Pac. Ry. Co.*, Mo., 122 S. W. 1125.

122. **Nuisance—Injunction by Individuals.**—The law is that injunction by individuals will not lie to prevent a nuisance when injury is common to the public; but it does not apply when plaintiffs’ injury is special, and they have suffered, and will suffer, damage over and above injury to the community at large.—*Atterbury v. West*, Mo., 122 S. W. 1106.

123. **Officers—Change of Salary During Term.**—Under Const., secs. 161, 235, if the fiscal court does not fix the salary of the county judge before election, it may do so afterward, but if such salary is fixed before election, it cannot be changed during the term.—*Grayson County v. Rogers*, Ky., 122 S. W. 866.

124. **Pleading—Amendment.**—A new demand, after filing an amended petition, is not necessary, where demand was made before action, and the allegations in the amended petition do not create a new cause of action.—*City of Columbus v. Bank of Columbus*, Ky., 122 S. W. 835.

125. **By-Laws of Benefit Society.**—The by-laws of a fraternal order held a part of the bill in a suit against the order, in determining the sufficiency of the bill on demurrer.—*Independent Order of Sons and Daughters of Jacob of America v. Moncrief*, Miss., 50 So. 558.

126. **Sufficiency of Complaint.**—Whatever is an essential element to a cause of action must be presented by a distinct averment, and cannot be left to an inference to be drawn from the construction of a document attached to the complaint.—*Ahlers v. Smiley*, Cal., 104 Pac. 997.

127. **Quieting Title—Possession of Plaintiff.**—Plaintiff held not deprived of possession so as to prevent her from suing to quiet title, where defendant induced her tenant in possession to pay him the rent and deliver possession to him upon the tenant’s removal after which defendant installed another tenant without plaintiff’s consent.—*American Bond & Investment Co. v. Hopkins*, Colo., 104 Pac. 1040.

128. Railroads—Signals at Private Crossings.—A railroad is not required to give notice of the approach of trains to a private crossing unless it has been customary for signals to be given which are relied on by persons using the crossing.—Louisville & N. R. Co. v. Engleman's Adm'r, Ky., 122 S. W. 822.

129. Reformation of Instruments—Mistake.—To justify a reformation of a deed for mistake, it is sufficient that the circumstances proved induce the conviction that there was a mutual mistake, and in showing in what such mistake consisted.—Owsley v. Matson, Cal., 104 Pac. 983.

130. Sales—Consequential Damages.—As a rule, the damages recoverable for a manufacturer's breach of warranty of machinery sold for a known purpose held to include such consequential damages as are the direct and probable result of the breach, including the reasonable expense caused by the defect.—W. T. Adams Mach. Co. v. Castleberry, Ark., 122 S. W. 998.

131. Delivery.—If a proposed constructive delivery is to operate as an actual delivery of goods sold, held, that the goods must be in condition for delivery without more to be done by the seller.—Back & Greive v. Smith, W. Va., 66 S. E. 1.

132. Schools and School Districts—School Lands.—The public domain set aside or located for common school purposes cannot be diverted, and constitutes a trust fund for educational purposes for the entire state.—Ellwood v. Stallcup, Tex., 122 S. W. 906.

133. States—Extension Into Ocean Waters.—A state bordering on the sea may, in the exercise of its sovereignty, extend its own borders for the distance of one marine league from low-water mark, and make the region so annexed as much a portion of the state as any other part of its territory.—United States v. Newark Meadows Imp. Co., U. S. C. C., S. D. N. Y., 173 Fed. 426.

134. Statutes—Construction.—In interpreting Acts 1889, p. 117, c. 81, providing that a conditional seller on regaining possession, shall advertise the property for sale "by printed hand bills or written or printed notices," the court may properly insert comma after "printed hand bills."—J. I. Case Threshing Mach. Co. v. Watson, Tenn., 122 S. W. 974.

135. Construction.—The letter of the statute must give way somewhat to its obvious intent, and it should not be construed so as to unnecessarily cause unreasonable results, or impute injustice to the legislature.—Rutter v. Carothers, Mo., 122 S. W. 1056.

136. Street Railroads—Collision Causing Injury to Passenger.—Where the negligence of two street railroads contributed to the injury of a passenger of one of them, the passenger could recover from both railroads, or either.—Kilmic v. San Jose-Los Gatos Interurban Ry. Co., Cal., 104 Pac. 986.

137. Taxation—Lot in More Than One County.—A village lot lying partly in one county and partly in another may be assessed for taxation in the county in which the greater part in value lies.—Fleming v. Charnock, W. Va., 66 S. E. 8.

138. National Bank.—A state may tax shares of stock in a national bank without regard to the fact that a part or the whole of the capital stock of the banks is invested in non-taxable bonds.—First Nat. Bank v. Board of Equalization of Independence County, Ark., 122 S. W. 988.

139. Tax Titles.—Where the affidavit made by the county treasurer did not show that any delinquent tax list and notice of tax sale were posted pursuant to 2 Mills' Ann. St. sec. 3835, the tax sale and deed based thereon are invalid.—American Bond & Investment Co. v. Hopkins, Colo., 104 Pac. 1040.

140. Telegraphs and Telephones—Damages for Negligent Delay.—A telegraph company negligently delaying the delivery of a message held liable for special damages, where it had notice of the importance of the message, though it is unintelligible.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co., Ky., 122 S. W. 952.

141. Territories—Accepting Deed for Seat of Government.—The power of the territory of Washington to accept a deed to land as a site for the capitol building held implied under provisions of Organic Act March 2, 1853.—Sylvester v. State of Washington, U. S. S. C. 30 Sup. Ct. 13.

142. Torts—Pleadings.—The complaint in a tort action should allege where the injury occurred to give defendant an opportunity to set up defenses that might arise by the law of that place.—McClain v. Lewiston Interstate Fair & Racing Ass'n, Idaho, 104 Pac. 1015.

143. Trespass to Try Title—Title to Sustain Action.—Where plaintiffs' ancestor, through whom both parties claimed as a common source in trespass to try title, had prior possession of the land, plaintiffs need not connect themselves with the sovereign of the soil.—Stephenville Oil Mill Co. v. McNeill, Tex., 122 S. W. 911.

144. Trover and Conversion—Title to Support Action.—Where drafts were payable to plaintiff, and she indorsed them to defendant to pay certain bills for her out of the proceeds, she had such interest in the proceeds as to support an action for conversion.—Humbert v. Mason, Colo., 104 Pac. 1037.

145. Trusts—Action to Establish.—Bringing an action to establish a resulting trust held a ratification of the act of a third person in having the land conveyed to defendants' intestate, and a sufficient assertion of his trusteeship for plaintiff.—Garten v. Trobridge, Kan., 104 Pac. 1067.

146. Vendor and Purchaser—Recovery of Money Paid.—Purchase money paid under a verbal contract of sale of land may be recovered in assumpsit for money received, where vendor has conveyed the land to a stranger.—Lipscomb v. Lipscomb, W. Va., 66 S. E. 8.

147. Wills—Construction.—Indefinite expressions in a will cannot be allowed the widest signification capable, if, when so read, they conflict with the general intent expressed.—Behrens v. Bauman, W. Va., 66 S. E. 8.

148. Witnesses—Cross-Examination.—Irrelevant questions on cross-examination may be excluded, though they may contradict witness upon new and irrelevant matter brought out on cross-examination.—Gilbert v. State, Fla., 50 So. 535.

149. Work and Labor—Compensation.—A married daughter, returning to the home of her father and rendering services at his request, held entitled to recover therefor.—Carrell v. McDonnell, Mo., 122 S. W. 1129.

150. Value of Services Rendered.—Plaintiff in an action for the reasonable value of his services cannot recover without proof of what the services were reasonably worth.—O'Meara v. McDermott, Mont., 104 Pac. 1049.

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THE FEDERAL CORPORATION TAX.

We have been much interested in the discussions regarding the constitutionality of the federal corporation tax statute and particularly in an article in the Columbia Law Review for December, 1909, upholding the statute as constitutional. Neither, however, in that article, nor in those taking the other view, have we noticed a phase which appears to us to have important bearing in the matter. This phase involves the question of who pays the tax?

This again suggests the inquiry of what in its essence is income, and who or what is capable of enjoying, or receiving the benefit of, income?

There are numerous definitions of the word income in its more elastic sense, but the statute concerns itself with one sort only, viz.: net income. That income is what remains in the way of clear gain upon business operations, after first allowing for depreciation of property.

This being so, it may be asked whether a corporation has any capacity to enjoy and, therefore, to receive for its benefit, any net income? Corporations are those which are gainful and those which are not gainful. But in what and for what are they, or are they intended to be, gainful? The answer is evident that they are thus for their stockholders. And, if this were not so, they would never come into existence at all. Corporate property is an insensate slave managed by hired overseers.

Let us illustrate this by the well-settled law, that it is within the power of a court to compel a board of directors to declare a dividend. It is true, that it is ruled, that the courts will rarely compel such a declaration, because the discretion of the board is deferred to out of regard for other stockholders who make no complaint. If, however, the power of such compulsion exists, it is upon the theory, that a corporate body is a mere stakeholder, at the sufferance of

the true owners of the profits. For a full citation of authority to this proposition we refer to Cook on Corporations, Sixth Ed., sec. 545.

But it may be said a corporation can enjoy and receive the benefits of net income by way of accumulating a reserve, or for anticipating indebtedness, or for extending and developing business. This, however, is merely for reasons of policy or management toward increasing dividends and in no wise in derogation of the principle that profits belong essentially to shareholders and are not assets of a corporation. A future discretion may bring assets back to mere capital. No debt against a corporation may conceivably affect its profits, for there are no profits which do not presuppose the extinguishment of debt.

Then we have reached this point. The net income an individual derives from his business and property is generally outside of the pale of federal taxation, except (if the federal corporation tax is constitutional) that part which accrues to him from investment in corporate stocks. And this is so (as must be the reason) because technically such income does not vest in the shareholders, until it is formally set apart by the declaration of a dividend.

It may well be conceded that taxation may be upon listing by, or assessment against, fiduciaries of any and every kind, but that is not the kind of a question which presents itself in the levying of this corporation tax. Such listing or assessment is for convenience. It affects in no adverse way the *cestui que trustent*. It creates no new imposition. If the property were not taxed in one hand it would be in another.

By the federal statute, however, property is sought in a "twilight zone" between capital and earnings, the former being corporate assets, the latter shareholders' assets. If the corporation can be said to have any title to the latter, it is fugitive, and perishable of its own instability. At most it is technical—the corporation being a naked trustee. Now, can it be fairly supposed that a fundamental law like the federal constitution contemplated that the taxation it

authorized should rest for its validity upon mere technical title, where there exists no beneficial interest? To our mind, such an interpretation reduces that great instrument to a level below that of a statute. It comes down to a particularization in the grant of powers, such as from an historical viewpoint no one could for a moment conceive was in the thought of the constitution's framers. They had nothing akin to corporation problems, which could have suggested, in the remotest way, that there could be any real distinction in taxation between income from investment in corporate stocks and that from investment in anything else. And, if they had supposed there ever might be, this would have been regarded to become more a matter of state policy than of national concern.

Taxation of a federal kind is more strictly, than that of states, purely *in rem* and when the *res* is in a national situation. It occupies no such situation when it belongs to a corporation or artificial being, rather than to an individual or natural being.

We consider, that it would be perfectly competent for a state to declare, that profits should vest absolutely in shareholders without the intervention of declaration of a dividend, and that a shareholder should have the right to demand his actual, rather than a declared, dividend. And we believe this would be the effect if in the absence of a statute providing for dividend declaring. We know the state protects capital stock by limiting declaration of dividends. Declaring dividends is regulation only. It is a mere dividing among owners of the whole, or a part of the whole, of their property. The state could say this division should be a certain percent of that whole and such would be a domestic policy. Dividend means that which must be divided. When the United States touches such policy, it assails state administration of the affairs of the creatures which it allows to come into existence. The power to tax is the power to destroy. A state encourages corporations. The United States discourages them. If the corporations are *quasi-public* its instrumentalities are taxed. It is established beyond the possibility of controversy, that state instrumentalities are as immune from federal taxation, as federal instrumentalities

are from state taxation. See Collector v. Day, 11 Wall. 113; U. S. v. Railroad Co., 17 Wall. 322; Ambrosini v. U. S., 187 U. S. I.

A summary then, of the situation is, that the right to tax corporations on their net income is based, if it exists at all, on mere technical ownership with the burden falling no more on it than on any other stakeholder or trustee, and this tax invades state policy in respect of something that has no federal aspect in any way whatever. As neither the burden nor the invasion seems constitutional, the statute ought to fall. The fight upon the law would appear more likely to succeed, if made by the owners of the profits than by their stakeholders—the corporations themselves.

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—CONSTRUCTION OF STATUTE MAKING PENAL FALSE REPORTS BY UNITED STATES BANKS.—In 70 Cent. L. J. 3 and 4 are referred to two decisions by the federal Supreme Court and one by the Eighth Circuit Court of Appeals touching the character of construction of penal statutes. We claimed that the latter court carried the rule of strict construction to the unreasonable length of defeating the plain purpose of legislation and that the two decisions of the former rejected that view. By another recent case, U. S. v. Corbett, 30 Sup. Ct. 81, our contention in this regard appears yet more plainly, the position of this same court of appeals being directly overruled. The overruled case is that of Clement v. United States, 149 Fed. 308, 79 C. C. A. 243.

In the Clement case it was held that Rev. Stat., section 5209, forbidding the making of "any false entry * * * with intent * * * to deceive * * * any agent appointed to examine the affairs of any such association" did not cover the making of a false report to the comptroller. The word "agent" was construed to mean subordinate agent appointed by the comptroller "to examine," etc.

The supreme court had said in Cochran v. United States, 157 U. S. 286, the word "agent" did also embrace the comptroller, and this case, though decided prior to the Clement case was not referred to by it. As no question of this kind was raised in the Cochran case, the Corbett case "considers the meaning of the section as an original question," the opinion being by Justice White, from which Justices Day and McKenna dissent.

Justice White, speaking of the rule of strict construction of penal statutes, says: "The

principle is elementary, but the application here sought to be made is a mistaken one. The rule of strict construction does not require that the narrowest technical meaning be given to the words employed in a criminal statute, in disregard of their context and in frustration of the obvious legislative intent." After quoting to like effect from United States v. Hartwell, 6 Wall. 385, the Justice then goes on to say: "It is to be observed that the rule thus stated affords us ground for extending a penal statute beyond its plain meaning. But it inculcates that a meaning which is within the text and within its clear intent is not to be departed from because, by resorting to a narrow and technical interpretation of particular words, the plain meaning may be distorted and the obvious purpose of the law may be frustrated."

That sort of statement comes quite nearly, as it seems to us, to doing away with the rule altogether.

It looks to us as if the Corbett case was correctly decided, but we feel some hesitancy in feeling that it required such a broad statement as Justice White has formulated. The comparison of other sections of the banking law with section 5209 well shows, that the comptroller was embraced in the word "agent," and, indeed, he is an agent, and, therefore, there is no plain meaning departed from in embracing him, though if the section stood alone he would not be held embraced. His duties under the act correspond to those of an agent, though in ordinary parlance he is called an officer. But so are subordinate agents officers.

SHALL CONGRESS BE GIVEN POWER TO ESTABLISH UNIFORM LAWS UPON THE SUBJECT OF DIVORCE AMONG THE STATES OF THE UNION.

The growing tendency of the American people to seek divorce, the apparent feeling in certain circles that the relation of husband and wife, that most sacred of all personal relations, is a mere legal ephemera, suggest serious and pressing questions worthy of investigation. Whether the evils resulting from our divorce law have or have not attained the dimensions portrayed by alarmists, they should be dealt with by our moral and political philosophers as things manifestly tending to degeneracy.

Whether or not uniform divorce laws

should be established by congress among the states of the Union is a broad and intricate question.

In attempting to answer the above question, the utmost caution must be observed, in order that we fail not to discriminate between the moral and the legal phases of divorce. The hypothesis, in which we are given divorce laws, precludes the necessity of our passing upon the morality of divorce. In effect, the question is—Shall we unify various existing sanctions to the dissolution of the marital relation? Shall the states composing the Union surrender, by amendment to the constitution, their exclusive jurisdiction of divorce and authorize congress to pass uniform laws upon the subject. Common sense and good morals as well, suggest that such additional power be vested in the central government. Keeping ever in mind the fact that we are not to concern ourselves with the moral phase of divorce, let us investigate the present status of divorce in this country.

We find that with the exception of South Carolina, every state in the Union sanctions the dissolution of the marital relation through divorce laws each prescribing in what manner and upon what provocation the bonds of matrimony will be severed. According to the jurisdiction, the parties desiring legal separation find it more or less difficult to satisfy the courts that the necessary requisites to bring them within the sanction exist, that prescribed conditions obtain in their particular case. It will be observed that here, the moral phase of divorce more nearly coalesces with the legal phase than at any other point of our treatment, for granted that release from the marital bonds is itself moral, the grounds upon which in a given instance it may be sanctioned may be insufficient to the point of immorality. But again, let us recall that it is with the expediency of uniformity of the grounds only with which we are to deal.

What is it then that is claimed to create the necessity of uniform divorce laws among our states? The answer is that, the uncertainty of status as a result of the variance between the laws of our states

gives rise to abuses and evils which require a corrective. Then let us investigate this variance and weigh the materiality of the evils resulting therefrom.

The variance between the divorce laws of our states will be found to exist with respect to the grounds upon which a divorce may be obtained, as to matters of jurisdiction, as to matters of defense and lastly, as to the penalty imposed upon the guilty party or parties. Now let us consider each of these forms of variance in turn.

(1.) *Grounds.*—A careful study of the various grounds of divorce recognized in the different states will lead us to the conclusion that uncertainty of status does not result to such a degree from this as from the other forms of variance and that it concerns more intimately the right to a decree of divorce than the status of the parties as effected by such a decree. The minute we enter into a discussion of whether certain grounds as established by a state are proper or improper we are verging upon if not intruding upon the moral phase of divorce. Again, should we pursue the question of uniformity of grounds of divorce, because parties may now go into one state and secure a divorce on grounds held insufficient therefor in the state from which they came, we would intrude upon the matter of jurisdiction. For the present then, we will dismiss this form of variance as a cause of that uncertainty of status on account of which uniformity in our divorce laws is claimed to be necessary, and examine the variance of jurisdiction with which it is almost inseparably interwoven.

(2.) *Jurisdiction and Defense.*—For a most valuable treatment of the subject of "The Dissolution of the Marriage Status by Divorce," we refer to Minor's Conflict of Laws, Chapter VII. In this investigation we should confine ourselves to that portion of the above treatise dealing directly with matters of jurisdiction and defense, for the uncertainty of status now existing as a result of the various theories propounded by our states, and upon one or the other of which theories the states base their laws,

will be clearly brought to view. In dealing with these several theories, Mr. Minor writes:

"Many theories have from time to time been advanced by the courts, some of which have been incidentally adverted to in prior sections of this work, and all of which have now been pretty generally discarded, except three leading ones. The first of these is entirely favorable to the resident plaintiff, sacrificing to the sovereignty of his domiciliary law all the rights of the defendant. The second is entirely favorable to the non-resident defendant, sacrificing the rights of the plaintiff to the sovereignty of the defendant's domiciliary law. It forces the plaintiff for the most part to sue for his divorce in the courts of the defendant's domicile, and requires him to subject himself to its laws. This theory is supported by the courts of New York, and may be designated "the New York doctrine." The third strikes a happy mean between the first and second, and while giving to the plaintiff all the rights conferred by his own law, permitting him to sue in the courts of his domicile, yet requires that the defendant should receive a more substantial notification of the existence of the suit than is afforded merely by a published advertisement in a newspaper of the plaintiff's domicile. This may be designated "the New Jersey doctrine," and is believed to be the soundest. The theories thus briefly outlined will now be elaborated more fully.

First Theory.—Jurisdiction over one party confers jurisdiction over the other also. According to the first theory, in order that the divorce court may have complete jurisdiction of the res, so that its decree will receive recognition everywhere as dissolving the relation of husband and wife, it is only essential that one of the parties should be domiciled there—it is immaterial which, though it will usually be the plaintiff. The courts of that party's domicile, having jurisdiction over his or her status will draw to themselves, by reason of the mutuality of the marriage relation, jurisdiction of the status of the other party also, thus acquiring jurisdiction of the status of

both. The case (under this theory) is practically identical with that where both parties are domiciled within the limits of the state of the divorce, and the proceeding, as in that case, is regarded as one strictly *in rem*, the personal element of the proceeding being disregarded altogether. Hence (under this theory) only such notice is required to be given the non-resident defendant as is required by the municipal law of the state of divorce in order to give its courts jurisdiction—frequently nothing more than an advertisement published in some obscure newspaper of that state.

It will be observed that this doctrine upholds in full measure the sovereignty of the plaintiff's domicile with respect to his status, but in so doing it oftentimes permits grave (and very unnecessary) injustice to be done to the defendant, who frequently finds himself or herself divorced, without any previous knowledge whatever that proceedings for that purpose were pending. The laws and procedure of the plaintiff's domicile are devised to protect the plaintiff's interests, not those of the alien defendant. This constitutes the weakness of this theory. Its tendency is to violate that general principle of private international law that no man should be condemned unheard. It is a different case from that of a proceeding against property of the defendant. In that case a general publication is deemed sufficient because it is practically certain that the owner will be promptly notified of any blow aimed at his property. But his status is a more intangible thing, and more personal in its nature.

Second Theory.—Divorce a Proceeding in Personam.—So impressed have the New York courts been by the personal element in the suit for divorce, and the dangers threatening the non-resident defendant under the first theory that they have adopted as extreme (and unjust) a view in the other direction. According to this second theory, the personal element above mentioned preponderates, and causes a proceeding whose purpose is to dissolve a status to be regarded in the light of a proceeding *in personam* rather than a proceeding in

rem; and the same process is required to bring the defendant before the court as is required if the design were to fasten upon him or her a general pecuniary liability. The New York courts hold that no foreign divorce obtained in a state where the plaintiff alone is domiciled will be valid extritorially, unless the defendant voluntarily appears or is personally served with process within the territorial jurisdiction of the divorce court.

This theory gives undue weight to the personal element involved. It magnifies the rights of the defendant, and goes far to insure that no injustice will be done that party; but it will frequently be at the expense of the plaintiff and the sovereignty of the plaintiff's domicile. It practically, in many cases, forces a plaintiff who desires a divorce, at the very least to seek out the defendant, and sue in the state selected by the latter, for the very reason perhaps that its laws are more hostile to the plaintiff than his or her own; and, since the municipal laws of most states require the plaintiff to be domiciled in the state where he seeks a divorce, this theory would often compel him to abandon his own state altogether, and take up his permanent residence in the domicile of the defendant, or else forego his right to a divorce entirely. It pays no heed to the sovereignty of the plaintiff's domicile and its control over his status, which is just as pronounced as that of the defendant's domicile over the status of the latter. These are serious drawbacks to this theory—so serious indeed that it is not surprising that most courts have rejected it as unsound.

Third Theory.—Divorce Neither in Rem Nor in Personam, but Quasi in Rem.—Requires Best Notification Practicable to Non-Resident Defendant.—The third theory, adopted by the courts of New Jersey, is the best in point of reason, principle, and justice to all parties, combining as it does the advantages of both the other theories, and minimizing the disadvantages of both. According to this theory, the personal element entering into a divorce suit is neither disregarded to the extent of making the di-

orce a proceeding in rem, nor so magnified as to make it a proceeding in personam. It is accorded its proper weight, and the divorce is regarded as a proceeding quasi in rem, that is, it is sufficiently a proceeding in rem to permit a court having jurisdiction of even part of the res to adjudicate upon it, without having to bring the person of the defendant within its jurisdiction, either by voluntary appearance or by service of process within the territorial limits of its authority; yet sufficiently in personam to require something more than a mere advertisement of the pendency of the suit, if more than that is practicable.

Full effect is thus given to the sovereignty of the plaintiff's domicile and to his or her rights. The plaintiff is permitted to get the full benefit of the divorce laws of his own state, and is not required to go to the state of the defendant and subject himself to its laws in order to obtain his divorce. The jurisdiction of the plaintiff's domicile over his status is recognized everywhere. The only limitation (and it is surely a most reasonable one) is that the non-resident defendant should be actually notified of the pendency of the suit, where that is practicable, by mail, message, or actual service of notice (not by advertisement merely).

This affords almost every protection to the defendant which is obtained by the New York rule, and at the same time leaves the plaintiff's rights and the sovereignty of the plaintiff's domicile untrammeled, save by a regulation for the protection of the absent defendant, which, while it can do the plaintiff no injury, affords a protection against the prostitution of justice, which it should be the lofty aim of every system of law to prevent.

This theory does not absolutely demand in all cases, in order to an extritorial recognition of divorce, actual notice to be given the defendant, but only that the best notice practicable be given him or her. If his address is known, actual notice in some form is necessary; if unknown, only reasonable notice and opportunity to be heard is required. Of course,

therefore, the voluntary appearance of the defendant will supersede the necessity for specific notice.

It will be remembered that when the decree directs that the guilty party shall not marry again, the better opinion is that such part of the decree is in personam, not in rem, and hence the court is without jurisdiction to make such a decree against a non-resident defendant, unless he or she has voluntarily appeared, or (perhaps) has been personally served with process within the territorial jurisdiction of the court. And even, then, such part of the decree, being in the nature of a penalty, will be given no extritorial effect."

From this presentation it is clear how uncertain may be the status of divorced parties upon a change of domicile if viewed from the standpoint of the new jurisdiction, and in many cases when viewed from the standpoint of the domiciliary law itself. No argument should be required to impress upon an intelligent mind the expediency of unification as to matters of jurisdiction and defense, for the abuses which the existing variance here leads to are manifest. What argument in favor of such variance can be sustained? Certain states may attract persons to its jurisdiction by the laxity of its requirements with respect to divorce and derive thereby much benefit commercially speaking, but is divorce a subject to be handled by a board of trade? Emphatically, no.

In keeping before us the proposition that the pulse of social morals is indicated by tribunals of justice, we are not relying upon that phase of divorce to support our own contentions, which we have denied to our opponents.

Penalty.—Some states impose a penalty upon the guilty party in a divorce proceeding which attaches a disability to contract a subsequent marriage. Binding as such a disability may be within the jurisdiction of the court imposing the penalty, it is easily overcome by the penalized party resorting to some jurisdiction where no such disability attaches to the guilty party. In such jurisdiction, a valid marriage may be con-

tracted and the contracting parties enabled to return to the original jurisdiction and dwell as man and wife, recognized as such, by the very courts which imposed the disability. In other words, the variance between the laws of the several states makes possible a complete evasion of the law of some of those states. What reason may be brought to the support of such a legal anomaly? Then too, certain questions with regard to other incidents of divorce, such as costs and alimony arise, creating the greatest bewilderment and militating against that certainty of status which is claimed to be expedient. To what end is such confusion of service to the states.

What say the opponents of unification of our divorce laws? Three general arguments will be advanced:

First.—The usual argument against the amendment of the constitution. It will be said that the constitution would have included such a provision had the states deemed it wise to delegate this power to congress; that to give the central government this additional power is to diminish the reserve power of the states to too great an extent, etc., etc.

Such arguments do not in any way deny that the divorce laws should be uniform among the states. In fact, by implication, we may infer a tacit acknowledgment at least, on the part of the propounder of such an argument that he is not opposed to unification itself, but merely to the further delegation of power to the central government.

The powers delegated to the central government group themselves under two heads.
(1.)—*Powers Incident to the Sovereignty of the United States.*

(2.)—*Powers Which it was Deemed Expedient that the United States as a Sovereignty Should Exercise.*

To the latter class belongs the power of congress to establish uniform laws among the states on the subject of bankruptcy. The exercise of this power by congress was permitted on the grounds of expediency and not because of some innate peculiarity of

insolvency. The evils growing out of the lack of uniformity of the laws among the states on the subject of bankruptcy required energetic curtailment for the good of the states themselves and each state had come to know by bitter experience that no state by itself was able to eradicate those evils, which by their very nature were the outgrowth of co-existing sovereignties over whose jurisdictions it could exercise, no control. Since the evils then were general and each state was individually unable to destroy them, to say that the states delegated to congress the power to make uniform laws on the subject of bankruptcy is erroneous, since a power never in the states could not be disposed of by them. The states however, did surrender to a certain extent their power to legislate as to bankruptcy, a power at times utterly unavailing in themselves, and by reason of such surrender specified that congress might make uniform laws on that subject. In other words, by surrendering a power which was ineffective in their own hands against a deadly evil, the states were immeasurably benefitted under the common weal. And so the right which each state now reserves to make its own laws on the subject of divorce can in no way be used to the eradication of the evils due to lack of uniformity of the divorce laws among the several states. No state may now eradicate the evil growing out of the practice of its own citizens seeking the sanction of other jurisdictions to acts contrary to the laws of their own community, since no state has the power to make uniform laws upon any subject among all the states and, therefore, to enable congress to make such laws would not be to take such a power from any or each of the states. It is true that each state would be divested of a power, that of making its own divorce laws, but by a general surrender of this right the states would authorize congress to correct the abuses which they themselves are now powerless to reach. It is true also that the power of congress would be increased, but to the great benefit of the states, assuming that uniform divorce laws would be bene-

ficial, which our opponent so far has not denied.

Second.—There are many, however, who will contend that uniform divorce laws are not desirable on the ground that the laws governing divorce should be peculiarly influenced by local policy; they will take the ultra-conservative view that divorce laws are local issues, that environment, territorial circumstance and peculiarities in the organization of societies render a difference in such laws quite necessary among the states of the Union. Facts do not support such a contention.

Let us consider three typical sections of the United States, each comprised of a number of states in which the organization of society is very similar, as a result of a common religious and social influence. First let us take that section comprised of Virginia, North Carolina, Kentucky and Tennessee. An examination of the laws of these states will disclose the fact that there are twenty-two grounds of absolute divorce recognized by one or the other of the four.¹

Of the twenty-two grounds, but two are common among the four states, namely: (a) Adultery and (b) pregnancy of wife at time of marriage unknown to husband. Of the remaining twenty grounds, but two are common to three states (Virginia, Kentucky and Tennessee), (a) Abandonment, etc.; (b) Conviction of felony, etc. Two others are common to Kentucky and Tennessee, (a) Cruelty, etc.; (b) Habitual drunkenness, etc., while seven of the remaining sixteen grounds are recognized only in Tennessee, six only in Kentucky, two only in Virginia, and one only in North Carolina.

Are the differences between the societies of Virginia, North Carolina, Kentucky and Tennessee, so great as to demand such variance in their laws? In answering this question it should be borne in mind that one of the only two grounds common to the members of this group is recognized by

¹It is possible that these figures may not be exact, due to recent changes in the laws of the various states.

Authorities consulted: Reports of Commissioner of Labor. Marriage and Divorce.

every state in the Union which recognizes divorce, while the other is recognized by such states as Wyoming and Iowa, Kansas, Missouri, and West Virginia, besides most of the gulf states, far removed from the influence of the Virginia group. It is only reasonable, therefore, to deny that the peculiar needs of society are consulted by the states of that group in the adoption of laws establishing the grounds of divorce.

A second section of the United States in which society is similar to a marked degree among the states comprising it, is composed of the states of New York, Massachusetts, Connecticut, Rhode Island, New Hampshire, Vermont and Maine. Among these seven states we find twelve grounds of absolute divorce recognized with adultery as the only common ground. Two grounds only, viz.: (a) Abandonment, etc.; (b) Cruelty, etc., are common to six of the seven states in this group. Failure or neglect of husband to provide for wife is a ground common to the five states of Massachusetts, Rhode Island, New Hampshire, Vermont and Maine, and habitual drunkenness, etc., is a ground common to the five states of Massachusetts, Rhode Island, New Hampshire, Connecticut and Maine. Conviction of felony, etc., is a ground common to four states; impotency to three states; a religious provision to two states, one ground is recognized only in Connecticut, while the last two of the twelve grounds are recognized only in Rhode Island.

Here again, we are unwilling to grant that, such social dissimilarities exist among the people of New York and the six New England States, as to justify such variance among their divorce laws.

With the exception of Louisiana, the States of the Mississippi Valley have been too greatly influenced by Virginia and Carolina, of New England and New York, to afford a distinct original social group. Let us pass on then to the Pacific Coast, where a conglomerate society exists, a society which, while distinct, is not original, and which as a whole owes its character neither to the direct influence of the Cava-

lier and Scotch-Irish elements of Virginia and Carolina, nor to the Puritan influence of New England, New Netherlands and New France.

Taking California, Oregon and Washington then as our third group, we find among them, eleven grounds of absolute divorce. Five of these grounds are common to the three states, two are common to Oregon and Washington, one is common to California and Washington, and the remaining three are recognized only in Washington.

Are we not constrained to ask if the character of the Washingtonian is so entirely dissimilar to that of the Californian that necessity, by reason of territorial circumstance and local peculiarities demands eleven grounds of divorce for the former, while but five seem necessary for the latter! Wherein consists the necessity?

In this third group the variance becomes all the more unwarranted when we consider the newness of the country as regards the inhabitants; the absence of segregated societies as a result of traditions and local attachments. In our eastern groups, some slight weight may be given to the plea of local issue for there, customs, the offspring of time, of three centuries of friction, revolution, and social segregation, accentuate locality. While it is true that, the sea, the mountains, the desert or the forest, may influence the race which dwells within their respective confines, yet the weight of time alone can make the impression, and we find no such factor entering into the problem of our Pacific group.

Third.—There will be found those also who argue that unification of the divorce laws of the several states would necessarily disturb the present status of many, and affect the marriage relation in general. Such arguments will be advanced more frequently by persons from sections of our country, wherein persons of African descent are to be found in large numbers, mixing promiscuously with the whites. It is plain to see that the fear of miscegenation prompts such an argument.

The answer to such an argument is that

divorce presupposes a valid marriage. To divorce, means to separate from the condition of husband and wife, and only those can assume that relation who have been united in lawful wedlock. There can be no baron unless there be a femme. Since this is true, unification of the laws governing the release of man and woman from the marital obligation does not concern the question of who is and who is not married. That question is left as before for the states to decide to their own satisfaction, and should they make provisions rendering miscegenation unlawful, there can be no baron and femme upon which the congressional laws could act, for the laws which congress would be empowered to make, would merely prescribe in what manner and upon what grounds those already married might be released from that relation.

The three great arguments against unification of the divorce laws among the states have been generally stated above, and a brief refutation only has been attempted, but have we not indicated the general lines along which the fallacy of those arguments is to be established?

It would appear that more forceful objections must be advanced, than those usually brought forth, in order to justify a refusal on the part of the states to authorize congressional control of the subject of divorce, and thereby correct many of the abuses attendant upon, and the evils resulting from our present system.

If divorce, as a legal institution, is to exist in one form or another amongst our people, is it not desirable that a common and well-defined channel be staked out for those seeking its haven? Is it not eminently wise that the divorce court be circumscribed by uniform safe-guards among our people, and shall we not establish a supreme tribunal to pronounce the sanction of dissolution from that most sacred of all our relations?

Surely the great weight of reason leads us to regard with favor the ~~unification~~ of our laws on the subject of *divorce*.

JENNINGS C. WISE.

Richmond, Va.

HOMICIDE—DRUNKENNESS AS DEFENSE.**STATE v. RUMBLE.**

Supreme Court of Kansas, November 6, 1909.

That drunkenness may have rendered one charged with a crime incapable of knowing the nature and quality of his act, or of distinguishing between right and wrong, does not constitute a defense.

MASON, J.: Charles Rumble was convicted of murder in the second degree, and appeals. It was admitted that he shot and killed, without any provocation or apparent cause, a man who, so far as the evidence shows, was a total stranger. The theory of the defense was that he was insane. The state maintained that he was merely intoxicated. The most important assignments of error relate to the exclusion of evidence bearing upon the question of his sanity, and to the instructions given and refused regarding the effect of drunkenness.

Witnesses were produced in behalf of the defendant who testified, in effect: That they had known him for several years and had had opportunity to observe his usual conduct; that they had noticed at different times peculiar and eccentric actions on his part, which they described in detail. They were then asked whether in their judgment he was sane or insane. Objections were sustained to all questions of this character. Ordinarily the rejection of such evidence is reversible error. State v. Beuerman, 59 Kan. 586, 53 Pac. 874. The state contends, however, that the testimony here excluded was objectionable or immaterial for some or all of these reasons. (1) It did not specifically refer to the condition of the defendant at the time of the homicide; (2) the witnesses said that the defendant bore a good reputation as a quiet and peaceable citizen, and this was inconsistent with the theory of insanity; (3) the witnesses were not shown to have had sufficient opportunity of observation to render their opinions of any value; (4) the facts detailed by the witnesses had no tendency to justify a belief that the defendant was insane. Of these propositions it may be said, in order:

1. The evidence rejected did not specifically relate to the precise time of the homicide; but this was not necessary, for the defense was obviously based on the theory that some form of mental derangement had existed for a considerable period.

2. A good general reputation was not necessarily incompatible as unsoundness of mind, manifested at intervals.

3. One of the witnesses had known the defendant more than six years, and had lived near him for over four years, not immediately prior to the homicide, however. Another had known him for nine years and had worked with him at different times, once for two months, eight years before the trial, and once for an unstated period within a year. This court has said that "whether there is a fair basis for an opinion must be left largely to the trial court." Kempf v. Koppa, 74 Kan. 153, 155, 85 Pac. 806, 807. But clearly the acquaintance of each of these two witnesses with the defendant was sufficiently intimate for the formation of a judgment as to his mental condition. As was said in the same case: "The courts do not undertake to lay down a definite rule as to how closely the witness must have observed the person whose sanity is the subject of inquiry in order to be qualified as a witness, as even a casual observer may discover mental manifestations that would make his testimony valuable."

4. The incidents detailed by the witnesses may not in themselves have justified a conclusion that the defendant was insane; but that was not necessary in order to render the evidence admissible. One of the cogent reasons for allowing a witness to give his opinion as to the sanity of the person the condition of whose mind is under investigation is that he cannot possibly place before the jury every circumstance that has influenced his judgment in the matter. As was said in Zirkle v. Leonard, 61 Kan. 636, 637, 638, 60 Pac. 318: "If all the facts on which the opinion is based could be placed before the jury, the latter could judge of the sanity or insanity as well as the witness; but there are certain indicia of mental disorder which are indescribable. Peculiar conduct, acts, and deportment of the person may create a fixed and reliable judgment in the mind of an observer which could not be conveyed in words to the jury. A person may appear to be sad, dejected, sick, or well, yet such appearance could not be described satisfactorily, and hence a conclusion is permitted to be given."

The court has never decided that a lay witness who has had opportunity to observe the conduct of a person whose sanity is called in question may not give an opinion upon the matter without first stating in detail the facts that have been observed, although this has sometimes been assumed in a general statement of the rule. Baughman v. Baughman, 32 Kan. 538, 543, 4 Pac. 1003; State v. Beuerman, 59 Kan. 586, 589, 53 Pac. 874. A more accurate expression was formulated in Howard v. Carter, 71 Kan. 85, 91, 80 Pac. 61, 63, in these words: "It is well settled in this state that a

nonexpert witness may be permitted to give his judgment as to the sane or insane state of another's mind after having detailed to the jury the extent of his opportunities to deduce a correct opinion and judgment thereon." See also, *Grimshaw v. Kent*, 67 Kan. 463, 73 Pac. 92. A belief that a person is of sound mind could hardly be said to be founded upon any number of specific acts. Where an opinion has been formed that a person is insane, and testimony to that effect is offered, it is important that any instances of unusual conduct shall be stated, not necessarily to render the witness competent, but to aid the jury in placing a just value upon his conclusions. A statement of facts detailed by the witness tends to affect the weight to be given to his opinion, affording the court or jury opportunity to judge of his intimacy with the person about whom he is testifying, his facilities for observation, and the acuteness with which he has discerned peculiarities which might escape the notice of others." *Zirkle v. Leonard*, 61 Kan. 636, 638, 60 Pac. 318. In *Commercial Travelers v. Barnes*, 75 Kan. 720, 90 Pac. 293, the rule is thus stated: "Nonexpert witnesses shown to have had especial opportunities of observation are allowed to give opinion evidence of the mental condition of one under investigation in this respect, having first stated the facts upon which such opinions are based, or without stating such facts when opportunity is given to cross-examine in reference thereto." This is in accordance with the weight of authority and the better reason. See 3 Wigmore on Evidence, sections 1933, 1935, 1938, 1922.

A physician, who had examined the defendant a few months after the shooting, was asked to testify concerning his mental condition, but was not permitted to do so. The ground of this ruling is not clear; but in the brief of the state it is suggested that the question was too indefinite as to time. It seemed to relate, however, to the time of the examination, and on that theory was pertinent. *State v. Newman*, 57 Kan. 705, 47 Pac. 881, 16 A. & E. Encycl. of L. 614. The question of the defendant's guilt turned solely on whether he was insane. Inasmuch as he was not allowed to try to establish his insanity by the testimony of nonexpert acquaintances—one of the well-recognized means of proving such a fact—it cannot be said that he was given a fair opportunity to prove himself innocent. The trial court took the view that, to whatever extent the defendant may have been intoxicated, he was guilty of murder in either the first or the second degree, or was innocent; that his voluntary drunkenness might prevent his act from being first degree murder

by rendering him incapable of deliberation and premeditation, but could not upon a similar principle prevent it from being murder in the second degree. This was evidenced by an instruction reading as follows: "If you find that the defendant committed the act of killing as charged in the information, and that at the time he did so, he was in a state of intoxication, caused by his voluntary action, he is guilty of murder in the first degree, unless you further find that such intoxication was so extreme as to prevent his mind from the exercise of deliberation and premeditation, in which latter case he would be guilty of murder in the second degree."

Drunkenness, if so extreme as to make the existence of a definite purpose impossible, may be a defense to any crime of which a specific design is an essential element. "To regard the fact of intoxication as meriting consideration in such a case is not to hold that drunkenness will excuse crime, but to inquire whether the very crime which the law defines has been in point of fact committed." 17 A. & E. Encycl. of L. 407. If a person is too drunk to form an intent to kill, he cannot be guilty of any offense for the commission of which such intent is necessary. *State v. White*, 14 Kan. 538. At common law murder may be committed without any actual design to take life (21 Cyc. 712), and therefore drunkenness can be no defense to that charge (12 Cyc. 174, note 77). Under some statutes which divide murder into degrees, an involuntary homicide may be murder in the second degree. 12 Cyc. 174, note 78. In *Craft v. State*, 3 Kan. 450, 482, it was inaccurately said that to constitute murder at common law an intention to take life must precede the killing, and that whatever act would have been murder at common law is murder under the Kansas statute, being classified at first or second degree according to whether or not it was done deliberately and with premeditation, but in *State v. Young*, 55 Kan. 349, 355, 40 Pac. 659, it was held, following the Ohio decisions, that the use of the word "purposely" in defining second degree murder implies the existence of an intention to cause death, and this is the interpretation elsewhere placed upon that language. 21 Cyc. 712, note 50. It necessarily follows that drunkenness so extreme as to prevent the forming of a purpose to kill might, under our statute, reduce what would have been murder at the common law to manslaughter, and in a proper case instructions to that effect should be given. See cases cited in subdivision 5 of note in 36 L. R. A. 470, under subhead "Intent," and 12 Cyc. 172. It is to be borne in mind, however, that "the fact of intoxication, no matter how complete and overpowering, is not conclusive

evidence of the absence of an intent to take life," (State v. White, 14 Kan. 538, syllabus), and, as said in Zibold v. Remeer, 73 Kan. 312, 320, 85 Pac. 290, 293: "For a person to be too drunk to entertain an intent to kill, it would seem that he would have to be too drunk to entertain an intent to shoot."

The court also gave this instruction: "If the defendant shot said Frank J. Emery, as charged in the information, and at the time of said shooting he was intoxicated, the mere fact that he may have been intoxicated at said time furnishes no excuse for the killing of said Frank J. Emery, unless his intoxication was of such a degree that he was incapable of knowing the nature and quality of the act of shooting said Emery, or of distinguishing between right and wrong." This was too favorable to the defendant. "It can make no difference, where no specific intent is necessary, that the defendant was so drunk as to have no capacity to distinguish between right and wrong." 12 Cyc. 172. "Mental incapacity produced by voluntary intoxication, existing only temporarily at the time of the criminal offense, is no excuse therefor, or defense to a prosecution therefor. * * * The test of insanity as affecting criminal responsibility, that the accused must have labored under such a defect of reason as not to know the nature or quality of the act, or, if he did know it, that he did not know he was doing wrong, does not apply to drunkenness." 36 L. R. A. 466, note. "Temporary insanity immediately produced by intoxication does not destroy responsibility for crime, where the accused, when sane and responsible, voluntarily made himself drunk. To constitute insanity caused by intoxication a defense to an indictment for murder, it must be a settled insanity, and not a mere temporary mental condition." 17 A. & E. Encycl. of L. 405.

The county attorney submits that the homicide could not constitute manslaughter, because in any view of the evidence the facts did not bring it within any of the statutory definitions. No reason, however, is apparent why an instruction might not properly have been given under section 12 of the crimes act (Gen. St. 1901, section 1997). State v. Spendlove, 47 Kan. 160, 28 Pac. 994. The objection made to the applicability of sections 18 and 26 is that they involve the element of "heat of passion." That term, however, has a wide range of meaning. Section 27 includes any inexcusable and unjustifiable killing of a human being not otherwise classified by the statute that at common law would have constituted manslaughter.

It is not thought necessary to consider other assignments of error, as the questions to

which they relate are unlikely to arise again.

The judgment is reversed, and a new trial ordered. All the Justices concur.

Note—Intoxication as Affecting Criminality in Homicidal Cases.—The principal case is in line with general authority as we believe. But we submit some forms of instructions by various courts and comments by courts and will subjoin thereto one or two observations.

In Wright v. Com., 24 Ky. Law Rep. 1838, the opinion by Judge Poynter refers to Bishop v. Com., 22 id. 468, for a review of opinions for the proposition that temporary insanity, occasioned by the act of one getting drunk, is no excuse for the commission of homicide. The Wright case approved an instruction that if a lack of reason upon the part of defendant to know right from wrong, or sufficient will power to govern his actions, or to control his impulses, arose alone from voluntary drunkenness, and not from mental unsoundness, he was not excusable, for that reason. The conviction in this case was for murder and it was affirmed. The Bishop case in its review of Kentucky decision quotes the following from Keeton v. Com.: "The testimony offered should have gone to the jury so that they might determine the *intent* of the accused when he made the assault. It has been held by this court, in more than one case, that drunkenness is no excuse for crime, and constitutes no defense even in a case of homicide where the accused was unconscious of the nature of the act, if that condition of his mind was the result of voluntary intoxication with a knowledge of the effect of liquor on his passions; still it has been adjudged in these same cases that the physical and mental condition of the accused at the time of the homicide is competent to show an absence of malice, and thus reduce the crime from that of murder to manslaughter. Malice being one of the essential ingredients of murder if the accused was so unconscious as evidenced his want of capacity to entertain malice, then his offense is manslaughter."

In Missouri the following instruction was approved: "The court instructs the jury that in making up their verdict they will entirely disregard all the testimony with reference to the defendant being drunk, and that drunkenness cannot be pleaded in excuse, mitigation or defense of any crime." State v. West, 157 Mo. l. c. 318, approved in State v. Brown, 18 id. l. c. 212.

In Wilson v. State, 60 N. J. L. 171, the following instruction was sustained by a vote of 7 to 5: "It is an essential ingredient of the crime of murder in the first degree that there should be an intent to take life; any intoxication may be considered with reference to the existence of that intent and its wilfull, deliberate and premeditated character, and I charge you that, if, at the time of doing the act, the evidence shows you that this defendant was so intoxicated that his faculties were prostrated and he was rendered incapable of forming a specific intent to take life, then, although it is no defense and no justification for crime, his offense may thereby be mitigated to murder in the second degree."

The opinion cites from Coke, Hale, Blackstone and Bacon, that "such a person shall have no privileges by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." Its correctness was defend-

ed by Mr. Justice Park and Mr. Justice Littledale on the ground that otherwise: "There would be no safety for human life." Then the New Jersey court announces: "That the true rule, in my judgment, to be deduced from the authorities, is that there is a situation in which the fact of drunkenness is entitled to weight, not as an excuse for crime, nor in extenuation of it, but as a fact tending to show that the crime imputed was not committed. When the character and extent of a crime is made by law to depend upon the state and condition of the defendant's mind at the time, and with reference to the act done, intoxication as a circumstance affecting such state and condition of the mind, is a proper subject for inquiry and consideration by the jury."

But the minority of five thought this instruction too harsh, the dissent saying: "The question upon which this court is divided is whether the intoxication that may be considered by the jury upon the degree of murder must be such as rendered the defendant incapable of forming an intention to kill, or whether it may be such as satisfies the jury that as a matter of fact such an intention did not exist." The minority thought the latter theory was the more correct, because by the former rule: "The burden of proving the defendant's guilt and the quantum of proof were in no wise shifted or varied by the introduction of the defendant's testimony as to his intoxication." And because "a reasonable doubt might spring out of the drunkenness of defendant." Then it is argued that there are stages of intoxication which might produce a doubt about deliberation, etc. The instruction was said to require defendant "to prove that his faculties were so prostrated that he was incapable of premeditation," making in effect the presumption of sobriety the same as presumption of sanity.

In Brown v. State, 142 Ala. 287, it was said: "Voluntary drunkenness excuses no man for the commission of a crime which does not involve a specific intent, regardless of the nature and character of his mental condition as a result therefrom. The most that can be claimed on subject is, that the fact of excessive drunkenness is sometimes admissible to reduce the grade of the crime, when the question of intent, malice or premeditation is involved." That case approved a prior case holding partial intoxication unavailable to disprove specific intent. Accused must be incapable of knowing right from wrong, or having any consciousness of crime, and there must be stupefaction of the reasoning faculty.

The California Supreme Court referred to its statute to the effect that no act committed by a person while in a state of voluntary intoxication is less criminal for this reason, except when specific intent is a necessary element, which brings the matter to the jury. The court said upon this: "But a sane person who voluntarily becomes intoxicated is not relieved from responsibility because of any mental derangement, *mania a potu*, or insanity produced by and consequent upon his own voluntary act." Then the court distinguishes a permanently diseased brain from chronic alcoholism placing the victim in the same category as the congenitally insane. People v. Fellows, 122 Cal. 233.

In Thomas v. State, 47 Fla. 99, the Supreme

Court says: "Intoxication does not excuse or mitigate any degree of unlawful homicide, except murder in the first degree, unless as a result of such intoxication there be a fixed or settled frenzy or insanity, either permanent or intermittent."

In State v. Williams, 122 Iowa, 115, the court quotes an instruction which said among other things: "If a person is sober enough to intend to shoot at another and actually does shoot at and hit him, without justification therefor, then the law presumes that such person is sober enough to form the specific intent to kill the one he shot at, and in such cases is criminally responsible for the act," and "if defendant was sufficiently sober at the time of the shooting to distinguish between right and wrong and to form a specific intent, then the defense of drunkenness cannot avail him." Defendant was convicted of murder in the first degree and there was a reversal. The court said the "instruction should have plainly told the jury that, if from the evidence it found, that defendant was so drunk that he was incapable of forming an intent to do the act complained of, they should find him not guilty of the crime of murder. To this should have been added an instruction to the effect that his intoxicated condition should also be considered as bearing upon the degrees of his offense."

In Kempton v. State, 111 Wis. 127, the instruction was: "If you find from the evidence that he fired the shot which killed his wife, and if, when he did so, he was in such a condition from the use of spirituous liquors that he was not capable of forming a premeditated attempt to kill her, then you should consider the question of intoxication and you cannot convict him of murder in the first degree. But if he was able to form that intent to kill, willfully, deliberately and premeditatedly, when he fired the shot, then you must have nothing more to do with the question of his drinking and you should give it no further thought or consideration in the case, for then it cuts no further figure."

It was held that this was substantially in accord with Wisconsin decision and the prevailing rule on the subject. Then the court quotes an instruction "as a strictly accurate statement of the law" as follows: "If you shall find, etc., that this defendant at the time he struck the blow was in such condition from the use of spirituous liquors that he was incapable of forming an intent, then you may consider the question of intoxication. The question simply is, in short, was he at the time in such a condition mentally as to be incapable of forming the premeditated design to affect the death." But the opinion in the Kempton case also speaks as follows: "Courts have been very slow to break down the old common law doctrine as regards the effect of voluntary intoxication of a person at the time of the commission of a criminal offense by him. Formerly it was held to aggravate rather than mitigate the offense. Now, if from passion stimulated by intoxication, or from any other cause, a person, for the moment, is unable to exercise his reason, and while he is in such condition, though conscious of what he is doing and not so completely bereft of reason as to be legally irresponsible, he is uncontrollably moved thereby and does wrongfully kill another, he cannot be convicted of murder in the first degree. Clifford v. State, 58 Wis.

477. It is the condition, no matter how caused, overpowering and controlling reason, which reduces the offense to some lesser degree of criminal homicide. If reason, notwithstanding the intoxication or other disturbing cause, be not so completely dethroned, so to speak, but that the wrongdoer can exercise judgment, he must do so or pay the penalty of being held responsible for his acts regardless of such disturbing cause."

The theory about voluntary intoxication comes from our common law, as is remarked by the Wisconsin court. But we doubt whether it is in accord with American conception. The common law does not confine itself with such absolute strictness to the overt act doctrine as we do. We have no such crime as misprison of treason, for instance. The decision just rendered by a federal circuit court in the World Publishing Company-Panama libel case bespeaks strongly the American idea. But the voluntary intoxication idea is distinctly non-American. In its final analysis it could go to many things. For example, if one had a settled hatred for another he should refrain from going where he might come in contact with him, though he went with no intention to come in conflict with him, if he knew the sight of him of whom he felt hatred would probably or possibly lead to an encounter. In many other ways this "voluntary" theory might be applied, if even we know what the term embraces. Participating in a social gathering where intoxicants will be served in the way of hospitality might be such. We might also say that if voluntary gluttony would cause perverseness, then one killing another in that humor would lend aggravation to his offense. If a man gets drunk so as to nerve him to a particular deed of violence that is a different matter, but to say intoxication, whether voluntary or involuntary, may not assist in determining the existence of intent and its quality in the killing of a stranger does not seem in accordance with the nature of human passions. A man's own horror of his deed proves the contrary. And besides, what man really and certainly knows himself sufficiently to be held responsible, beyond a reasonable doubt, in drunken situations. He may have been a drunkard for years and quarrelsome merely in his cups and neither he or anyone else would expect murder at his hands.

The variety of expression by the courts seems to show that they wish to hold users of intoxicants to a sense of responsibility in fortuitous crime, when the state licenses the sale of what they use. It would look as if this policy made the state *particeps criminis*. It says in one breath drink what I command, but if it impels you to crime that fact is not to be urged by you against me. Sudden passion, hot blood, etc., disproves or tends to disprove premeditation, but if it is a circumstance that would not reasonably produce hot blood in a sober man, the state says an accused shall not be allowed to show it might in a drunken man, if his reason was not dethroned. An insult may be fancied by a drunken man. Shall it not be permitted to show he was drunk?

We hold no brief for drunkenness, but we do believe, that it is competent to show the interpretation placed, whether rightly or wrongly, by one who acts upon a supposed provocation. If a state gets revenue from liquor selling, responsibility for the evil consequences thereof ought not to be repudiated by its courts.

C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Railway—Goods—Notice that Certain Goods Would be Carried in Future at Owner's Risk Only, Unless Properly Packed—Alleged Unreasonableness of Notice.—By section 7 of the Railway and Canal Traffic Act, 1854: "Every such company as aforesaid shall be liable for the loss of, or for any injury done to, any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void; provided always that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any . . . articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable." A railway company gave notice that they would not in future carry certain flushing cisterns with projecting levers, unless they were properly protected by packing, except at owner's risk, owing to the relatively large number of these cisterns which got damaged in carriage. The plaintiff, after this notice, sent cisterns of this sort unpacked, and one being damaged, he claimed 30s. in the county court, alleging that the notice was bad as being unreasonable. The Divisional Court, affirming the judgment of the county court judge, decided in favor of the plaintiff.

Held, by Buckley and Kennedy, L.J.J. (Vaughan Williams, L.J., dissenting), that, on the facts proved, the notice limiting the company's statutory liability as carriers of these cisterns was not unreasonable, and that the company were entitled to judgment.—*Sutcliffe v. Great Western Railway Co.*, No. 1. App. Cas. rendered Dec. 1909.

Wills—Pecuniary Trust.—Where words of gift were used which by themselves were sufficient to give an absolute interest, that interest could not be cut down to a trust estate or to a life estate, with a trust for disposal after the determination of the life by a mere expression of desire that the property should be left by the donees to charitable purposes or another person. Here the property was given to the sisters of the testator absolutely, and their interest was not cut down by words as to the effect of which there was serious doubts.—*In re Conolly, Chancery Div.*, Dec. 15, 1909.

HUMOR OF THE LAW.

At a dinner attended by the late Governor Johnson, a New York millionaire said, in reference to his taxes: "I've got a little piece of property that brings me in a fair rental, and the tax gatherers haven't spotted it yet. I don't know whether I ought to tell them or not. What would you do, Governor Johnson?"

The Governor's eyes twinkled. "It's the duty of every man," he said, "to live unspotted. Still if I were you, I'd pay up."—Washington Star

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort and of all the Federal Courts.

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1. Adverse Possession—Streets.—Owners of adjacent lands by erecting structures in streets for their private benefit can acquire no permanent rights in the streets.—Weber v. City of Detroit, Mich., 123 N. W. 540.

2. Alteration of Instruments—Addition of Name of Witness.—Addition of witness' name to signatures to instruments without the obligors' knowledge held a material alteration.—Shaffer v. Mosier, Pa., 74 Atl. 426.

3. Authority of Holder.—Under Negotiable Instruments Law (Consol. Laws, c. 38) sec. 33, the holder of a note not providing for interest, or having any blank in which to add the words "with interest," held not authorized to add such words.—Usefot v. Herzenstein, 119 N. Y. Supp. 290.

4. Appeal and Error—Jurisdiction of Court on Appeal.—The Supreme Court, after obtaining jurisdiction on appeal, will not allow any disposition of the cause by the nominal parties, where the equitable interest of third persons will be prejudiced.—Sivley v. Sivley, Miss., 50 So. 552.

5. Motion for New Trial.—Where a verdict is directed for plaintiff, motion for new trial is not a condition precedent to review on appeal.—Albien v. Smith, S. D., 123 N. W. 675.

6. Right to Second Appeal.—A second appeal cannot be taken while former appeal is pending.—Cruzeu v. Merchants' State Bank of St. Hilarie, Minn., 123 N. W. 659.

7. Arbitration and Award—Agreement.—A party cannot complain that an arbitrary agreement provided for no notice of hearing before the arbitrator and none was given, where he was present at such hearings.—Travelers Ins. Co. v. Pierce Engine Co., Wis., 123 N. W. 643.

8. Associations—Agreements Under Seal.—Where an agreement between two unincorporated associations is under seal, members of one of the associations cannot maintain an action against the other association upon the agreement; they not being named as parties to the instrument.—Barzilay v. Lowenthal, 119 N. Y. Supp. 612.

9. Attachment—Affidavit.—An affidavit for an attachment, failing to allege the source of affiant's knowledge or to show facts justifying him in making the averment on personal knowledge, held insufficient.—N. Dain's Sons Co. v. Thomas McNally Co., 119 N. Y. Supp. 625.

10. Amendment.—Where by an amendment in attachment other claims are included which were not due at the commencement of the suit nor at the date of an intervening mortgage, the attaching creditor waived his attachment, and

his lien by the judgment subsequently rendered was of the date of the judgment only.—Bever v. Dobreas, Wis., 123 N. W. 638.

11. Attorney and Client—Suspension of Attorney.—The practicing of law by one occupying a judicial position is not one of the causes for removal or suspension of an attorney.—Baird v. Justice Court of Riverside Tp., Cal., 105 Pac. 259.

12. Bankruptcy—Liability of Receivers.—A receiver held not individually liable for rent of premises subleased by the bankrupt.—Alexis v. Koehler, 119 N. Y. Supp. 664.

13. Banks and Banking—Payment of Forged Check.—A depositor, who signed checks in blank, is liable to the bank for money paid on a check which was stolen and filled out by an unauthorized employee.—Trust Co. of America v. Conklin, 119 N. Y. Supp. 367.

14. Rights and Liabilities—Negotiable Instruments Law.—Law held not to apply to a bank paying a forged check, purporting to be drawn by one of its depositors, not given to pay any existing or antecedent debt of the depositor or forger, and not to prevent recovery by the bank on account of the payment so made.—Title Guarantee & Trust Co. v. Haven, N. Y., 89 N. E. 1082.

15. Benefit Societies—Domicile.—The migratory headquarters of a beneficial association organized under the law of the state cannot control the jurisdiction of its courts when the rights of its citizens are involved, and the domicile of the association controls in such case.—Golden Star Lodge No. 1 v. Watterson, Mich., 123 N. W. 610.

16. Increase in Rate of Assessment.—A beneficial insurance association held not entitled to increase the rate of a single assessment after a member entered into his contract of insurance.—Dowdall v. Supreme Council of Catholic Mut. Ben. Ass'n, N. Y., 89 N. E. 1075.

17. Bills and Notes—Bona Fide Holders.—Under Negotiable Instruments Law, the defense of usury held not available against a bona fide holder of a note.—Klar v. Kostiuk, 119 N. Y. Supp. 683.

18. Duebill.—Indorsee of duebill containing no words of negotiability takes it subject to all defenses.—Mackin v. Blalock, Ga., 66 S. E. 265.

19. Illegal Consideration.—Maker of note seeking to avoid it for want of jurisdiction or for illegal consideration has the burden of proof.—Tinker v. Midland Valley Mercantile Co., Okla., 105 Pac. 333.

20. Boundaries—Establishment.—In an action by a vendee against the vendor to establish a boundary, the fact that plaintiff has obtained from a third person a quitclaim deed to a strip of land between conflicting surveys does not affect defendant.—Aiken v. Boyd, Wash., 104 Pac. 1101.

21. Brokers—Confidential Relations.—Agent agreeing to negotiate for the purchase of land for another cannot purchase on his own account one of the tracts and hold it against the interest of his principal.—Rogers v. Genung, N. J., 74 Atl. 473.

22. Sale of Stock.—The rule that, where one of two innocent persons must suffer for the act of a third, he that employs and puts trust and confidence in the wrongdoer should be the loser, may be invoked against brokers selling stock and warranting forged signatures to a blank assignment without knowledge of the forgery.—Bassett v. Perkins, 119 N. Y. Supp. 354.

23. Cancellation of Instruments—Surrender of Benefits.—Plaintiff, in a suit to set aside a void contract with her husband, prior to divorce, held bound to restore the benefits received to the extent of her ability.—Lake v. Lake, 119 N. Y. Supp. 686.

24. Undue Influence.—The wife, joining her husband in the execution of a contract, is a necessary party to rescind it, on the ground of fraud and undue influence.—Borchert v. Borchert, Wis., 123 N. W. 550.

25. Carriers of Goods—Bill of Lading.—A carrier held not entitled to deliver goods until presentation of the bill of lading.—Young v. New York Cent. & H. R. R. Co., 119 N. Y. Supp. 703.

26. Liability as Warehouseman.—Where the liability of a carrier sued for loss of goods was

that of a warehouseman only, plaintiff must show negligence on the part of the carrier in the care of the goods.—*Lyons v. New York Cent. & H. R. R. Co.*, 119 N. Y. Supp. 703.

27.—**Limitation of Liability.**—The common-law liability of a carrier may be limited by special contract with the shipper (executed in October, 1904).—*Chicago, R. I. & P. Ry. Co. v. Wehrman*, Okl., 105 Pac. 328.

28.—**Limitation on Value of Goods.**—A shipper must be presumed, at least *prima facie*, to have read a receipt, limiting the express company's liability as to the value of the goods, and to have assented to it.—*Florman v. Dodd & Childs Express Co.*, N. J., 74 Atl. 446.

29.—**Special Damages.**—A carrier is liable for special damages for delay in delivery, where notice of special consequences of delay is given.—*Gledhill Wall Paper Co. v. Baltimore & O. R. Co.*, 119 N. Y. Supp. 623.

30. **Certiorari—Review.**—In reviewing by certiorari a judgment of the district court, all intendment will be taken in favor of the judgment.—*New Jersey Produce Co. v. Gluck*, N. J., 74 Atl. 443.

31. **Chattel Mortgages—Description of Property.**—The description of property mortgaged in a chattel mortgage, and permission given by the mortgagor to remove the same to a specified location, held sufficient to identify the property mortgaged.—*Albien v. Smith*, S. D., 123 N. W. 675.

32. **Contracts—Consideration.**—Failure to pay the consideration moving to a public service corporation is, as a rule, a bar to an action for not rendering the service under such contract, brought by the party failing to pay.—*State v. Mountain Spring Co.*, Wash., 105 Pac. 243.

33.—**Husband and Wife.**—A contract between a husband and wife from which she could procure no benefit except from the event of dissolution of marriage held contrary to public policy, and void.—*Lake v. Lake*, 119 N. Y. Supp. 686.

34.—**Performance.**—A contractor employing a subcontractor held not entitled to demand reimbursement for failure of the subcontractor to perform specified things.—*Murphy v. Number One Wall Street Corp.*, 119 N. Y. Supp. 693.

35. **Corporations—Foreign Corporations.**—The indorsement in the state to a foreign corporation of a note executed in the state held not the doing of business in the state.—*People's Sav. Bank of Bay City*, Mich., v. *Fulton Contracting Co.*, 119 N. Y. Supp. 622.

36.—**Right to Acquire Real Estate.**—The inability of a corporation to acquire title to any property cannot be raised by a stranger claiming the property, but can only be questioned by persons directly interested in the corporation or by the state.—*Illinois Steel Co. v. Warrens*, Wis., 123 N. W. 656.

37.—**Sale of Stock.**—A warranty by brokers, indorsed on a certificate of stock sold by them, of the genuineness of signatures to a blank assignment of the certificate, is not a special, but a general, continuing warranty.—*Bassett v. Perkins*, 119 N. Y. Supp. 354.

38.—**Transfer of Assets to Partnership.**—Where the assets of a corporation transferred to a partnership exceed the corporate debts assumed by the partnership, a creditor of the corporation is entitled to make the debt out of the assets and to a lien thereon, enforceable if the partnership does not pay, though the firm is not personally liable.—*Midland County Sav. Bank v. T. C. Prouty Co.*, Mich., 123 N. W. 549.

39. **Courts—Appealable Orders.**—An order of the New York Municipal Court denying an application for a reargument of a previous motion to open an alleged default judgment is not appealable.—*Percy v. Sirs*, 119 N. Y. Supp. 225.

40.—**Change of Venue.**—The court is not bound to grant a change of venue for the prejudice of the judge, though accused's affidavit is not contradicted.—*State v. Tawney*, Kan., 105 Pac. 218.

41. **Covenants—Restrictive Building Covenant.**—A restrictive building covenant in a deed held not to prevent the building of a private garage as an addition to a dwelling.—*Beckwith v. Pirung*, 119 N. Y. Supp. 444.

42.—**State of Demand.**—State of demand on

contract for payment of money need not allege demand, where it is not required by the contract sued on.—*De Jianne v. Citizens' Protective Ass'n of New Jersey*, N. J., 74 Atl. 443.

43. **Criminal Law—Failure to Call Wife as Witness.**—Held not improper to instruct that the wife is not a competent witness against her husband, but that he may call her if he desires.—*Rhea v. Territory*, Okl., 105 Pac. 314.

44.—**Limiting Argument of Counsel.**—It was not an abuse of discretion, or a denial of defendant's constitutional right, to limit his counsel to 15 minutes argument to the jury, in a prosecution for the violation of a city ordinance.—*City of Seattle v. Erickson*, Wash., 104 Pac. 234.

45.—**Want of Arraignment.**—That a jury was sworn, and the state began the examination of prosecutrix before accused had been arraigned and pleaded, held no ground for mistrial.—*State v. Kinghorn*, Wash., 105 Pac. 234.

46. **Deeds—Loss or Relinquishment of Rights.**—That a deed is not recorded or is lost held ineffectual either to devest the legal estate or revest it in those appearing as owners of record.—*Lake v. Weaver*, N. J., 74 Atl. 451.

47.—**Sufficiency of Description.**—The description of the property conveyed must be sufficient to identify it with reasonable certainty, but a tract may be conveyed by a distinguishing name by which it is known without reference to the boundaries.—*St. Dennis v. Harris*, Or., 105 Pac. 246.

48. **Dower—Estate Acquired.**—Where the owner of land died, leaving a widow and three children, the land descended to his children, subject only to a lower interest, and on the widow's death the property descended to a surviving child.—*Barrier v. Young*, Miss., 50 So. 559.

49. **Easements—Right-of-Way.**—One having means of access to his premises over his own lands cannot acquire a prescriptive right-of-way over adjoining lands by an occasional use for his own convenience.—*Menter v. First Baptist Church of Eaton Rapids*, Mich., 123 N. W. 585.

50. **Eminent Domain—Public Necessity.**—In proceedings to condemn land for a public use, evidence of the damaging effect of the taking to any portion of the public is competent to aid the jury in determining whether there is a public necessity for the taking.—*Board of Education of City of Grand Rapids v. Brown*, Mich., 123 N. W. 562.

51. **Evidence—Admissions.**—The admission of an agent to bind the principal must be a part of the *res gestae*.—*Jungworth v. Chicago, M. & St. P. Ry. Co.*, S. D., 123 N. W. 695.

52.—**Fraudulent Conveyance.**—Evidence that personal property was assessed to an alleged seller, and not to the alleged buyer, for many years after the sale, is inadmissible to show fraud.—*Comeau v. Hurley*, S. D., 123 N. W. 715.

53.—**General Reputation.**—That a person is unmarried may be established by general reputation in his family.—*Jacobs v. Fowler*, 119 N. Y. Supp. 647.

54.—**Judicial Notice.**—In the absence of proof of the law of a foreign country, the court on appeal cannot determine that the foreign law defeats an action.—*Carnell v. Halpin*, Mich., 123 N. W. 578.

55.—**Parol Evidence.**—Where an assignment of a chose in action admits of two interpretations as to the subject-matter, parol evidence is admissible.—*New Jersey Produce Co. v. Gluck*, N. J., 74 Atl. 443.

56.—**Weight and Sufficiency.**—A party bringing out testimony of a witness by making the witness his own witness is bound by his statements, though they may be a conclusion of the witness.—*Reclamation Dist. No. 70 v. Sherman*, Cal., 105 Pac. 277.

57. **Extradition—Race Prejudice.**—The mere suggestion that the alleged fugitive from justice will not receive a fair and impartial trial in the demanding state because of his color does not require the executive of the surrendering state to refuse to surrender him, nor furnish a ground for relief on habeas corpus.—*Marbles v. Creecy*, U. S. S. C., 20 Sup. Ct. 32.

58. **Federal Courts—Jurisdiction.**—Federal court of chancery has jurisdiction where proper

diversity of citizenship exists to determine interest of an heir in an alleged lapsed legacy, and consequent increase in the residuary estate.—*Waterman v. Canal-Louisiana Bank & Trust Co., U. S. S. C., 30 Sup. Ct. 10.*

59.—**Title to Land Below High Water.**—The contention that rights below the high-water mark of navigable nontidal waters can be asserted by patentees from the United States as appurtenant to the uplands as against the title of the state held too clearly unfounded to raise a federal question within the original jurisdiction of a federal court.—*McGillivra v. Ross, U. S. S. C., 30 Sup. Ct. 27.*

60. **Fire Insurance**—Mortgage Clause.—Under mortgage clause, mortgagor held bound by award of appraisers, though he was not a party to the appraisal.—*Erie Brewing Co. v. Ohio Farmers' Ins. Co., Ohio, 74 Atl. 1065.*

61. **Fixtures**—Partitions.—Partitions placed in the rooms of an office building by the lessee held trade fixtures, and not "fixtures" technically, so as to make them annexed to the realty.—*United Booking Offices v. Pittsburg Life & Trust Co., 119 N. Y. Supp. 216.*

62. **Fraud**—Fraudulent Representations.—Fraudulent representations by the active partner to the co-partner to obtain a settlement of the firm affairs held material, and, when relied on by the copartner to his injury, the essential elements of fraud exist.—*Salhinger v. Salhinger, Wash., 105 Pac. 236.*

63. **Frauds, Statute of**—Parol Gift.—A parol gift of land to a child will be sustained, notwithstanding the statute of frauds, after possession and the making of permanent improvements.—*Cook v. Cook, S. D., 123 N. W. 693.*

64. **Fraudulent Conveyances**—Sale of Stock in Trade.—Act Aug. 17, 1903 (Acts 1903, p. 92) regulating the sale of merchandise in bulk, does not apply to a sale of all lumber manufactured at a sawmill.—*Cooney, Eckstein & Co. v. Sweat, Ga., 66 S. E. 257.*

65. **Gaming**—Pledge to Secure Gambling Debt.—A pledge of stock to secure note given in payment of a gambling debt is void.—*Menard v. Wacker, Nev., 105 Pac. 287.*

66. **Homicide**—Self-Defense.—Before self-defense would arise upon threats, some act must be done by decedent indicating a purpose to carry such threats into execution.—*Rhea v. Territory, Okla., 105 Pac. 314.*

67. **Husband and Wife**—Mortgage of Wife's Property.—A husband is not a necessary party to a mortgage on the separate property of his wife.—*Hope v. Seaman, 119 N. Y. Supp. 713.*

68.—Purchases by Wife.—Husband held not liable for apartment decorations furnished to his wife, in the absence of proof that they were necessaries or that he had authorized the purchase.—*Proctor v. Woodruff, 119 N. Y. Supp. 232.*

69. **Indiana**—Trust in Tribal Lands.—No trust exists in favor of members of a tribe and their descendants because of letters patent, following the language of Choctaw Treaty, Sept. 27, 1830 (7 Stat. 333) art. 2, under which the patent was made, granted to the Choctaw Nation a tract of land in fee simple.—*Fleming v. McCurtain, U. S. S. C., 30 Sup. Ct. 16.*

70. **Injunctions**—Contempt.—A stranger to a suit in which an injunction issued held not subject to punishment for contempt for violating the injunction.—*In re Zimmerman, 119 N. Y. Supp. 215.*

71.—**Nature of Remedy.**—Injunctive relief is not a matter of right, but of discretion, and plaintiff must show that he is equitably and in good conscience entitled thereto, in addition to showing equitable grounds for relief.—*Campau v. National Film Co., Mich., 123 N. W. 606.*

72.—**Summary Proceedings.**—A complaint to restrain a landlord from bringing summary dispossess proceedings, alleging an oral agreement to renew the lease, held to state a cause of action, notwithstanding Real Property Law.—*Grimes v. O'Conor, 119 N. Y. Supp. 660.*

73. **Innkeepers**—Property in Guest's Possession.—An innkeeper, having notice that a piano delivered to his guest was not the guest's property when delivered held not to have a lien thereon, under Lien Law (Laws 1909, p. 17, c. 28, Consol. Laws, c. 33) sec. 181.—*Lurch v. Brown, 119 N. Y. Supp. 637.*

74. **Interstate Commerce**—State Regulation.—The state has power to regulate the sale to consumers by retailers within its borders of adulterated food properly shipped into the state and sold to the retailer in interstate commerce.—*Armour & Co. v. Bird, Mich., 123 N. W. 580.*

75. **Judgment**—Against Tort Feasors.—Where two persons jointly commit a tort, and the administrator or executor of one of them is substituted as a defendant with the other wrongdoer, the judgment at law cannot ordinarily be a joint judgment against the survivor and the executor or administrator of the deceased wrongdoer.—*Borchert v. Borchert, Wis., 123 N. W. 628.*

76.—**Against Wrongdoers for the Same Act.**—Different judgments against different wrongdoers for the same wrongful act may be for different amounts, and the same result may follow where there is one action against all the wrongdoers.—*Cole v. Roebling Const. Co., Cal., 105 Pac. 255.*

77.—**Motion to Vacate.**—Whether a motion to vacate a tax judgment constituted a general or special appearance, the judgment and order denying the motion held binding on the moving parties and final until set aside.—*Flueck v. Pedigo, Wash., 104 Pac. 1119.*

78. **Landlord and Tenant**—Estoppel.—Payment of rent by persons employed to manage premises for a lessee held not to create an estoppel against lessor, suing them on the lease.—*Russell v. Banks, Cal., 105 Pac. 261.*

79.—**Fixtures.**—Partitions of a temporary nature, erected by the lessee of rooms in an office building, held not "improvements," but "movable office furniture," within the meaning of the lease, and removable by the lessee.—*United Booking Office v. Pittsburg Life & Trust Co., 119 N. Y. Supp. 216.*

80.—**Trespass.**—A landlord cannot sue in trespass for injury to land in the exclusive possession of his tenant, but his action should be in case.—*Van Ness v. New York & N. J. Telephone Co., N. J., 74 Atl. 456.*

81. **Libel and Slander**—Special Damages.—Only special damages which must be pleaded and proved are recoverable in an action of slander of title.—*McGuinness v. Hargiss, Wash., 105 Pac. 233.*

82.—**Truth as Defense.**—The truthfulness of a libel is a complete defense to a civil action.—*Merrey v. Guardian Printing & Publishing Co., N. J., 74 Atl. 464.*

83. **Life Estate**—Incumbrance.—A life tenant purchasing the property at the foreclosure of a mortgage because of his failure to pay interest held not to acquire a title which will defeat the right of the remaindermen.—*McCall v. McCall, Mich., 123 N. W. 550.*

84. **Life Insurance**—Cancellation of Policy.—An insurance company suing to set aside a policy obtained by fraudulent misrepresentations must restore the premiums received as a condition of relief.—*Metropolitan Life Ins. Co. v. Freedman, Mich., 123 N. W. 547.*

85.—**Change of Beneficiary.**—Rule that an original beneficiary of a policy is entitled to the value thereof up to the time the beneficiary is changed from the proceeds when the policy becomes a claim does not apply to Industrial Insurance.—*Metropolitan Life Ins. Co. v. Hoopell, N. J., 74 Atl. 467.*

86.—**Loan on Policy.**—Where a loan agreement between insurer in a life policy and insured and the beneficiary was fully executed prior to the death of insured, the beneficiary could not urge that the loan agreement was ultra vires.—*Frese v. Mutual Life Ins. Co. of New York, Cal., 105 Pac. 265.*

87. **Evidence**—Lost Instruments.—To establish a lost instrument, the evidence must be such as to leave no reasonable doubt as to its terms.—*Scurry v. City of Seattle, Wash., 104 Pac. 1129.*

88. **Master and Servant**—Dangerous Appliances.—Servants deliberately choosing a dangerous appliance, when a safe one was furnished for their use, held negligent.—*Pleisner v. Citizens' Telephone & Telegraph Co., Wis., 123 N. W. 642.*

89.—**Duty of Master.**—A master is not required to adopt the safest and best known methods of performing his work, but only such as are reasonably safe, and as would be adopted by

a person of ordinary care and prudence.—*Ozogar v. Pierce, Butler & Pierce Mfg. Co.*, 119 N. Y. Supp. 405.

90.—Duty to Instruct Servant.—A master must instruct his servant as to dangers of which he knows or ought to know, and of which the master knows, or ought to know, the servant has no knowledge.—*Ramsey v. Raritan Copper Works*, N. J., 74 Atl. 437.

91.—Fellow Servant.—An employer held liable to an employee injured by another servant in the performance of different work under their common employment.—*Taylor v. E. C. Palmer & Co.*, Ia., 50 So. 522.

92. Mechanics Lien—Repairs by Lessee.—That lessor watched, or even passed on, improvements by lessee, removing partitions and painting and plastering, and for which a lien was claimed, held not to show that they desired to obtain the benefit thereof.—*Garber v. Spivak*, 119 N. Y. Supp. 269.

93. Money Paid—Leases.—An assignee of a part of a leasehold having paid the entire reserved rent, the law would imply a promise on the assignor's part to repay a proportional part.—*Johnson v. Zufeldt*, Wash., 104 Pac. 1132.

94.—Recovery of Voluntary Payment.—Money paid without any request or authority from the parties liable to pay the same is not recoverable in an action at law.—*Title Guarantee & Trust Co. v. Haven*, N. Y., 89 N. E. 1082.

95. Money Received—Actions.—The right to bring an action for money had and received held to exist when one has in his possession money which, in equity and good conscience, belongs to another.—*Hoyt v. Paw Paw Grape Juice Co.*, Mich., 123 N. W. 529.

96. Mortgages—Assignment.—An indorsee of a note secured by a mortgage is the owner of the mortgage without a further assignment thereof.—*Stitt v. Stringham*, Or., 105 Pac. 252.

97.—Foreclosure.—A deed, pursuant to a foreclosure decree, purporting to convey the fee, conveys all the title and interest of the parties to the action as of the date of the giving of the mortgage.—*Hope v. Seaman*, 119 N. Y. Supp. 713.

98.—Foreclosure and Resale.—The assignee of a purchaser on a resale under a mortgage foreclosure judgment, held not entitled to complain of the refusal of the court to determine, on motion, the ownership of after-acquired property.—*Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co.*, 119 N. Y. Supp. 304.

99. Municipal Corporations—Change of Street Grade.—The person who is damaged by the change of grade of an adjoining highway, so as to be entitled to compensation, is the one who owns the property when the change is made.—*People v. Stillings*, 119 N. Y. Supp. 298.

100. Negligence—Res Ipsa Loquitur.—The doctrine of res ipsa loquitur applies, though the precise act of negligence is not specified, where the accident is one which could not ordinarily have happened without negligence.—*Levine v. Brooklyn, Q. C. & S. R. Co.*, 119 N. Y. Supp. 315.

101. Nuisance—Injunction.—Right to injunctive relief against a nuisance is not a matter of absolute right, but rests on the conscience and discretion of the court.—*Raymond v. Transit Development Co.*, 119 N. Y. Supp. 655.

102. Parties—Designation of Individual.—That "James Benjamin Oric Shevill" was named in a summons and complaint as "Benjamin J. Oric Shevill" did not make him the less a party to the action.—*Hope v. Seaman*, 119 N. Y. Supp. 713.

103.—Joiner of Defendants.—Two or more jointly engaged in a tort are jointly and severally liable as the injured party may elect, and he may sue all or any jointly, or each separately.—*Cole v. Roebling Const. Co.*, Cal., 105 Pac. 255.

104. Partnership—Payment by Check.—Delivery by a debtor of a check to the agent of the creditor held a payment as between the debtor and creditor, though the agent forges an indorsement and steals the money.—*Burstein v. Sullivan*, 119 N. Y. Supp. 317.

105.—Rights of Surviving Partner.—The surviving partner is the legal owner of the firm assets, and the only right of the representative of the deceased partner is to have the co-partnership affairs liquidated.—*Reinhardt v. Reinhardt*, 119 N. Y. Supp. 285.

106. Perjury—Materiality of Testimony.—Materiality of false testimony held an essential ingredient of perjury.—*People v. Teal*, N. Y., 74 Atl. 1086.

107. Principal and Agent—Scope of Authority.—An agent for collection of rent and ordinary repairs held not to imply power to agree to pay for, or even authorize, improvements by a tenant, involving removal of partitions and painting and plastering.—*Garber v. Spivak*, 119 N. Y. Supp. 269.

108.—Undisclosed Principal.—Purchaser of coal, having reason to believe he is dealing with the principal, can set up, in the action for the price, any defense he has against the agent.—*Eldridge v. Finnegar*, Okl., 105 Pac. 334.

109. Principal and Surety—Part Performance.—An obligee may waive part performance of a contract, without discharging the sureties from liability for the due performance of the remainder.—*Revel Realty & Securities Co. v. Maxwell*, 119 N. Y. Supp. 257.

110. Public Lands—Sale Before Patent.—A claimant under the Oregon donation act who has not made final proof, but occupied the land for more than four years could make a valid deed of his rights after Amendatory Act July 17, 1854, sec. 2, by which the provision in section 4 of the earlier act was repealed.—*Sylvester v. State of Washington*, U. S. S. C., 30 Sup. Ct. 25.

111. Quieting Title—Cloud on Title.—A recorded notice of a contract for sale of land held a cloud on title.—*McGuinness v. Hargiss*, Wash., 105 Pac. 238.

112. Railroads—Crossing Accidents.—In an action against a railroad for injuries at a crossing, where it is certain from the physical situation that the plaintiff must have seen the engine, if he stopped to look, the jury will not be permitted to believe his statement that he did stop and look, but did not see the engine.—*Averbach v. Great Northern Ry. Co.*, Wash., 104 Pac. 1103.

113. Remedies—Laches.—A remainderman delaying until after the death of the life tenant before asserting his rights held not guilty of laches.—*McCall v. McCall*, Mich., 123 N. W. 550.

114. Sales—Breach of Contract.—The contract of a seller of an automobile to replace such parts "as may break in normal service" does not bind him to replace parts which are worn or defective.—*Barry v. American Locomotive Automobile Co.*, 119 N. Y. Supp. 237.

115.—Breach of Warranty.—Held, that the buyer, in case of an executed sale, cannot rescind for breach of warranty; but his sole remedy is an action for damages.—*Wirth v. Fawkes*, Minn., 123 N. W. 661.

116.—Construction of Contract.—The contract of a manufacturer to furnish machinery held to require the delivery of machinery that will accomplish the results contemplated.—*Bellows Falls, Mach. Co. v. Munising Paper Co.*, Mich., 123 N. W. 553.

117.—Failure to Deliver Within Agreed Time.—Where a seller agreed to deliver an engine within a certain time, he was liable for breach of contract on failure to so deliver, owing to the destruction of the plant where the engine was made and subsequent strikes.—*Isaacson v. Starrett*, Wash., 104 Pac. 1115.

118.—Implied Warranty.—Where the seller of goods is not the manufacturer thereof, held there is no implied warranty of freedom from latent defects.—*Whitman v. Jacobson*, 119 N. Y. Supp. 246.

119. Set-Off and Counter Claim—Subject Matter.—It is against the policy of the law to permit an executor to set-off his individual claim against a distributee.—*In re Wentz's Estate*, Pa., 74 Atl. 424.

120. Vendor and Purchaser—Executory Contract.—An assignment by the purchaser in an executory contract for the sale of land will not relieve him from liability thereunder, nor create any personal liability on the part of his assignee.—*Midland County Sav. Bank v. T. C. Prouty Co.*, Mich., 123 N. W. 549.

121. Witnesses—Right to Disregard Entire Testimony.—Conscious falsehood or intentional misstatement must be found upon the part of a witness before the whole of his testimony may be disregarded.—*Corrigan v. Wilkes-Barre & W. V. Traction Co.*, Pa., 74 Atl. 420.

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EXCLUDING FROM INTRASTATE BUSINESS FOREIGN CORPORATIONS ENGAGED IN INTERSTATE COMMERCE.

The Supreme Court of the United States has just handed down a very important decision, declaring, that the Kansas statute imposing the payment of a given per cent on the total authorized capital of a foreign corporation, engaged in interstate commerce, as a condition of its right to do local business, is unconstitutional. *Western Union Tel. Co. v. Kansas* (not yet reported).

The court stood five to three for reversal of the State Supreme Court, and it was said the late Mr. Justice Peckham agreed with the majority. Justice Holmes wrote a dissenting opinion, concurred in by the Chief Justice and Justice McKenna. Justice Harlan wrote the principal opinion and Justice White rested his concurrence on special grounds, saying, however, that he did "not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies."

We have a very exalted opinion of the learning of Justice White and have always greatly delighted in his lucidity of expression. But we confess we do not know from what he here says whether he concurs in the application made of that "fundamental principle" or not. Justice Holmes could say exactly what Justice White said and still insist upon his dissent.

As we understand the opinions, there is no difference between members of the court about any fundamental principle, as there was but one fundamental principle and that accepted by every court in the land. That principle is that "an interstate carrier, entering a state for purposes of its business is subject to local regulations that in their essence and purpose only incidentally affect interstate commerce."

Justice Harlan, however, and those agreeing with him, hold, as we understand the majority, that the authorized capital of a

corporation, which is employed in all of its business, cannot be made the basis of a percentage to fix the price of privilege for the doing of intrastate business, because in this way a direct burden is laid upon interstate business.

Justice Holmes goes on the theory, that the state did not attempt to impose a tax or liability at all, but it demanded of the Western Union a certain sum of money for the privilege of carrying on local traffic. It seems to us that the majority have the better of the argument in this contention.

The only reason why Justice Holmes can say the state demands the payment of a certain sum of money is by the rule of *id certum est quod certum reddi potest*.

But when you come to look for the factors in certitude, you find one of them based on an instrumentality—if we may so denominate capital—in interstate commerce. If with one carrier doing a small local traffic the capital is large, the price of doing that small traffic is large. If with another carrier doing a large local traffic the capital is less, the price for doing that large local traffic is less. Therefore it seems to us impossible to escape the conclusion, that a factor which should not enter into the price is a constituent thereof.

Furthermore, this factor is based on property, that either is, or may be, situated outside of a state which is in no wise taxable by it.

It seems to us, also, that the majority are right on the line of the distinction well recognized in that court between requiring a foreign corporation to stipulate as a price of admission to a state that it shall not remove cases to federal courts, and expelling it from a state, if it does this.

The tendency of a tax upon the entire capital is a tendency towards denying to a foreign corporation the right to employ as large a capital in the doing of interstate business as it has a mind to. The parent state might do this and the effect, in deference to state authority, might be looked on as only incidentally affecting interstate commerce. The provision would be saved by state policy or police power. And a

state might say that no foreign corporation with a capital exceeding a fixed sum should be allowed to do intrastate business. The effect might be looked on as incidental.

But when a state, without having any domestic policy to subserve, visits a penalty on an interstate carrier, which is adversely affected purely because of its magnitude in interstate commerce, the federal supreme court is compelled to conclude, that the rule for the penalty is not "established in good faith for the protection, safety, comfort and convenience of the people" of that state. To prevent the operation of such a statute is not depriving a state of anything it needs to retain. It is merely to keep it within the sphere of its domestic control.

We think there is some distinction between this and the giving of a foolish or no reason at all for the excluding of a foreign corporation from the doing of intrastate business. Each state is the judge of its own foolishness, but no state is entitled to interfere with paramount law, either for a foolish or other reason.

Therefore we think Mr. Justice Holmes and those who agreed with him are mistaken in supposing that the principle in *Security M. L. Ins. Co. v. Prewitt*, 202 U. S. 246, is departed from.

Nevertheless, we think he overturns very completely the reasoning advanced by Mr. Justice White for his special concurrence. The latter justice considered that there was a tax and it was confiscatory, and it was the latter because unescapable by option not to do local traffic. This option, coming after the company had been invited to do business in the state and had made there large investments, was considered by him an option to destroy the value of those investments by abandonment or pay the exaction.

Mr. Justice Holmes thought the company's investments were made by it "in dependence upon the will of the state," and knowing that what it did or acquired "was infected with the original weakness" of that dependence, it stood like a newcomer in the state. He cites as seemingly conclusive on this proposition the very recent case, among

others, of *United States v. Delaware & Hudson Co.*, 213 U. S. 366.

While the opinion of Mr. Justice Harlan might seem, at first blush, like a further advance on the road of federal encroachment upon state autonomy, examined closely, it appears to us to help more surely than do the opinions of Mr. Justice White and Mr. Justice Holmes toward an accurate defining of the boundary lines between state and federal power. Just as strongly as Justice Harlan here marks the limit of state control, so his opinions generally in defining the shadowy boundaries of the so-called "Twilight Zone," where federal and state jurisdictions are supposed to meet, have been like as a "pillar of cloud by day and a pillar of fire by night" to point us the strict and safer path of national power under the federal constitution.

NOTES OF IMPORTANT DECISIONS.

CRIMINAL LAW—PROSECUTION FOR PERJURY UPON AN AFFIDAVIT FOR CHANGE OF VENUE—A judge of a county court in Oklahoma had a party and his supporting witnesses arrested for making statutory affidavit for change of venue. Writs of habeas corpus were sued out in the Criminal Court of Appeals and the applicants were discharged. *Ex parte Ellis*, 105 Pac. 184.

The Oklahoma change of venue statute provides: "No judge of the county court shall sit in any cause or proceeding pending, after a party thereto has filed an affidavit in writing, corroborated by two credible persons residing in the county, stating that affiant has good reason to believe and does believe, that the judge is so prejudiced against him that he cannot have a fair and impartial trial, if such judge continues to preside in such case." The judge proved his thorough impartiality, and the utter lack of any good reason on the part of affiants to believe otherwise, by having the three arrested, forthwith, for perjury. This seems almost as conclusive proof, as that by a man, looking over the shoulder of one who was writing a letter, calling the writer a liar for a statement in the letter that a fellow behind him was reading all he was writing.

For a reason arising under local law it was first held that, "the county court was without authority to issue the commitment." Then the court considers the question "whether perjury can be assigned upon an affidavit that affiant has good reason to believe and does believe that a judge is prejudiced."

In the discussion of this question the court considers the Oklahoma constitution and other constitutions having similar provision to the following in the former: "Courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property or character and right and justice shall be administered without sale, denial, delay or prejudice." The conclusion was reached that the constitutional policy thus announced is self-operating and it is intended that it shall not be hindered by any possibility of a prosecution for perjury arising out of such an affidavit. It is said: "It is not an essential requirement that the judge should be as a matter of fact prejudiced," and the filing of the affidavit makes a change of venue compulsory.

We doubt the soundness of the reasoning. Certainly it would seem that, if the corroborating witnesses swore they were residents of the county, when they were not, they ought to be prosecuted for perjury, or at least punishable for contempt. If either may be done, some inquiry into the truth of what is alleged could be made. Now if one thing can be inquired into, why not another?" It may be conceded, of course, that the statement that affiant "does believe, etc., is not disputable. But that is not the material part of the affidavit. That merely goes to good faith in interposing it. But the fact that he and the corroborating witnesses swear there is "good reason to believe," etc., may be a little different. The other party is being denied a right to proceed where he is entitled to proceed and he ought not to be deprived of that right by perjury. We do not take a great deal of stock in the argument based on the constitutional provision. That is law in every civilized community and that whose constitution contains such a provision is not to be differentiated from one that has it not. It is as sacred in a statute as in a fundamental law. Or, if any stress is to be put on it, the argument might be turned around to the better securing to a suitor the appropriate local tribunal rather than taking him away from home.

As all of this part of the Oklahoma opinion is dictum, we take the liberty of suggesting to Oklahoma appellate courts to call a halt on dictum writing, placing ourself, as we think along with Judges Hayes and Dunn, two members of its Supreme Court, as shown by the case of Taylor v. Ins. Co., which we annotate in 70 Cent. L. J. 61. Their reports may become model reports if they tend to show that propositions once decided need no further discussion, nor persuasive authority to buttress them into favor.

OKLAHOMA'S STATE GUARANTY LAW.

As we in Oklahoma understand the origin of the so-called "State Guaranty" law it is one of the favored measures of the Hon. Wm. J. Bryan. Immediately after the panic of 1907, and upon the eve of the first state legislature, Mr. Bryan expressed the wish to our governor, that the new state of Oklahoma adopt such a bill. Upon the convening of that session of the legislature, it passed the measures as outlined by Mr. Bryan, and the bill became a law on the 14th day of February, 1908.

No bill ever passed in a western state has attracted more widespread attention, and no law has ever received more loyal devotion and none more acrimonious denunciation than has this measure.

In that all may understand the law, I will briefly quote from it as it appears on our statutes. In the first place, the bill excludes all except corporations from engaging in the banking business. It then in substance, provides: "A banking corporation organized under the provisions of this act shall be permitted to receive money on deposit not to exceed ten times the amount of its paid up capital and surplus, deposits of other banks not included, and to pay interest thereon not to exceed the rate that may from time to time be fixed by the bank commissioner, as the maximum rate that may be paid upon deposits by banks in this state.

* * * "There is hereby levied an assessment against the capital stock of each and every bank and trust company organized and existing under the laws of this state for the purpose of creating a depositors' guaranty fund equal to five per centum of its average daily deposits during its continuance in business as a banking corporation. Said assessment shall be payable, one-fifth during the first year, and one-twentieth during each year thereafter until the total amount of said five per centum has been fully paid.

* * * "After the five per cent assess-

ment shall have been fully paid up, no additional assessment shall be levied or collected against the capital stock, except emergency assessments hereinafter provided, to pay the depositors of failed banks, and except assessments as may be necessary by reason of increased deposits to maintain such funds at five per centum of the aggregate of all deposits of such banks and trust companies. Whenever the depositors' guaranty fund shall become impaired or reduced below five per centum by reason of payments of depositors of failed banks, the state banking board shall levy emergency assessments against the capital stock of each bank and trust company sufficient to restore said impairment or reduction, but the aggregate of such emergency assessments shall not in any one calendar year exceed two per cent of the average daily deposits of such banks and trust companies. If the amounts realized from such emergency assessments shall be insufficient to pay off the depositors of all failed banks, having valid claims against said depositors' guaranty fund, the state banking board shall issue and deliver to each depositor having any such impaired deposit, a certificate of indebtedness for the amount of his unpaid deposit, bearing six per cent. Such certificates shall be numbered and made payable upon call of the state banking board. Levies shall be made from year to year against the capital stock of banks and trust companies until said certificates are paid. * * "That hereafter all banks operating under the guaranty law of Oklahoma shall be permitted to advertise that their deposits are guaranteed by the depositors' guaranty fund, but that no bank shall be permitted to advertise its deposits as guaranteed by the state of Oklahoma."

The graveman of the bill, it will be noticed, is divided into three parts, as follows:

First: That individuals are excluded from engaging in the banking business in Oklahoma.

Second: That every bank is liable pro

rata for the obligations of every other bank in the state; and,

Third: That if the depositors' guaranty fund shall not be sufficient, the state will issue certificates in lieu of funds.

Whatever may be the merits or demerits of the bill as a matter of civil policy, I will leave that to the arbitrament of those whose business is that of banking, and will discuss the proposition briefly, from a purely legal standpoint, applying principles as old as law to facts which, in their aggregate capacity are new to the courts.

Is the Bank Guaranty Law Against Common Right?—Is, then, an act that excludes an individual from the right of engaging in the banking business, and confers the sole right upon corporations, subversive of common right, and therefore void?

The history of the rights of men to engage in any line of legitimate business, dates from the advent of William the Conqueror, about 840 years before the adoption of our constitution. It is the history of the Anglo-Saxon struggle to gain independence from the Norman kings. It is a history of the inalienable rights of mankind. The Magna Charta, as confirmed by Henry the Third, reiterates this principle. It is a part of the common law of this country, handed down to us from our English forefathers, and illuminates our whole constitution.

The Fourteenth Amendment provides that: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In order to understand this amendment, we must consider it from the simple standpoint of primal rights. In the Slaughter House Cases,¹ Mr. Justice Bradley, in speaking of the above clause, thus expressed its meaning: "The right to choose one's

calling is an essential part of that liberty which it is the object of the government to protect; and a calling, when chosen, is a man's property and right. Liberty and property are not protected where these rights are arbitrarily assailed."

In *Allgeyer v. Louisiana*,² the court in approving the above remarks, said: "The liberty mentioned in that amendment means not only the right of the citizen to be free from physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary or essential, for his carrying out to a successful conclusion the purposes above mentioned."

The Fourteenth Amendment becomes very plain when we consider the rights it intended to maintain. Natural liberty is that state of man in which nature found him. Might was right. Those rights were absolute rights. Might has no relation to the rights of others. Upon being accepted as a member of organized society, it became necessary for man to surrender so many of those absolute rights as he was in duty bound to yield in regard to the rights of others. These new rights are relative rights. Relative to the rights of other men, and relative to the rights of society organized into civil government. The great residuum of his absolute rights, inherent by nature, and one of the gifts of God, constitute civil liberty. Civil liberty is the great end of human government, and is that state in which each man has the right to pursue his own happiness, by engaging in any line of trade or industry, according to his own views and the dictates of his own conscience, unrestrained, except by equal laws, and to receive the equal protection of the laws.

In *Cooley on Torts*,³ it is said: "If the

constitution does no more than to guarantee that no person shall be deprived of his life, liberty or property, it makes an important provision on this subject, because it is an important part of civil liberty to have the right to follow all lawful employments."⁴

The banking business is of great antiquity. It has always been regarded as a field of common effort and open equally to all men. As an instrumentality of government, it has never been a franchise to be granted as a concession to any class. In the case of *Bank of Cal. v. San Francisco*,⁵ the court said: "Admittedly, the mere right to do a banking business is not a franchise in any sense of the word. It belongs to citizens generally, and is a common right, in the same sense that a right to do a grocery or dry goods business is available to all citizens, and no grant from the sovereign is essential to its existence."

Now, the banking business being a right common to every individual, subject to the police power only, and a corporation being a creature of the law with the rights of a natural person, and an entity separate and apart from its stockholders; is the individual who is already in the private banking business deprived of his property without due process of law by being denied the right to continue therein, and is the individual who wishes to embark in the private banking business and who is excluded from the right so to do, denied the equal protection of the laws?

In the *Slaughter House Cases*,⁶ Mr. Justice Bradley thus lays down the rule upon both points: "In my view, a law which prohibits a large class of citizens from adopting a lawful employment, or from following a lawful employment previously adopted, does deprive them of liberty, as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property."

(4) See also *In re Jacobs*, 98 N. Y. 92.

(5) 142 Cal. 276.

(6) *Supra*.

In State v. Scougal,⁷ the court of that state said: "Assuming that the business of banking is clothed with such public use that it may be controlled by the state (and we think it is affected with a public interest), still it does not follow that a citizen may be deprived of a right to carry on the business. This, like any other business, may be subjected to reasonable regulations, which shall alike apply to all citizens and corporations." In Ex parte Pittman,⁸ the syllabus is as follows: "Banking is a lawful business in which it is the inherent right of every citizen to engage." In Bank of California v. San Francisco,⁹ the court of California declared, in speaking of the banking business, that: "Any individual, or any number of individuals, may, under such regulations as the state, in the exercise of its police powers, legally make, engage therein, without any grant from the state."

In the late case of the First State Bank v. Schallenberger,¹⁰ it appears that the state of Nebraska, adopted an act prohibiting anyone except corporations from engaging in the banking business, and the bill contained the scheme to guaranty deposits that is embodied in the Oklahoma law. The court said: "It is entirely clear that this act of the legislature does deprive the citizen of his right to engage in a lawful business." In Bank of Augusta v. Earl,¹¹ the Supreme Court of the United States made use of the following language: "At common law the right of banking in all its ramifications belonged to individual citizens and might be exercised by them at pleasure."

The question has never been squarely before the Supreme Court of the United States, and until put to rest by that great tribunal, the law of Oklahoma must be conceded to be void under the Nebraska ruling. First State Bank v. Schallenberger, is an authoritative decision by the

highest court to which the matter has been presented.

Does a Bank Guaranty Law Take Property Without Due Process of Law?—The second proposition is this: Is the operation of the Oklahoma Bank Guaranty Law open to the vital objection that it amounts to a taking of private property without due process of law?

What has been said above is to the effect that the denial to an individual of the right to engage in the banking business is to deny to him the equal protection of the laws. The present phase of the case deals with the taking of private property without due process of law. It will be noticed that the grand scheme of the law-making body is that of paternalism of the state over the people. It may be good socialism, but until socialism gains control of this government the laws have to be construed in accordance with political institutions as they now stand. Paternalism at this day at least is not in harmony with the principles of government republican in form.

In the case of State v. Switzer,¹² the court said that: "Paternalism, whether state or federal, as the derivation of the term implies, is an assumption by the government of a quasi-fatherly relation to the citizen and his family, involving excessive governmental control of the private affairs and business methods and interests of the people, upon the theory that the people are incapable of managing their own affairs and is pernicious in its tendencies. In a word, it minimizes the citizen and maximizes the government. Our federal and state governments are founded upon principles wholly antagonistic to such a doctrine. Our fathers believed the people of these free and independent states were capable of self-government; a system in which the people are sovereigns and the government their creature to carry out their commands. Such a government is founded on the willingness and right of the people to take care of their own af-

(7) (S. D.), 51 N. W. 865.

(8) (Nev.), 99 Pac. 700.

(9) *Supra.*

(10) In the U. S. C. Ct. Dist. of Nebraska.

(11) 13 Pet. 519.

(12) 143 Mo. 287.

fairs, and an indisposition on their part to look to the government for anything. The citizen is the unit. It is his province to support the government, and not the government's to support him."

Referring to the question of due process of law, does this act violate the Fourteenth Amendment to the Constitution of the United States. The bill itself, *ex proprio vigore*, levies an assessment upon the depositors of the banks to be paid from the assets of the banks for the creation of the guaranty fund. The running levy is limited to five per cent of the average daily deposits. It at the same time provides the summary proceedings by which to compute the funds and gather into the hands of the state the money of the banks, without their consent, to be paid out to the depositors of a failed bank. The bill then delegates authority to the State Banking Board to levy emergency assessments of two per cent in the same manner, and to be disposed of in the same way. The exaction made is an act of state sovereignty. There is no trial. The property owner has no day in court. He has no chance to hear the proofs against him. He is denied the right of being heard. There is no contract right for entry of possession. There is no judgment passing title of his property from him to another. The act is mandatory. It changes title to private property without contract of conveyance or decree of court. The arm of the state reaches into the vaults of the banks and gives their property to the depositors of some failed bank. Is this, or is it not, due process of law? Due process of law means: "A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." Anything short of that, civil or criminal, is confiscation, either of life or property, as the case may be. The divesting of vested rights, the vesting of rights in class, all exactions of arbitrary power, are alike unknown to the common law, and belong to the absolutism of centralized authority.

In *Loan Association v. Topeka*,¹³ the

court held the transfer of private property the instrumentality of taxation to aid a manufacturing enterprise, was taking property without due process of law. Mr. Justice Miller said: "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic depository of power, is, after all, but a despotism. * * * No court, for instance, would hesitate to declare void a statute which * * * should enact that the homestead now owned by A should no longer be his, but should henceforth be the property of B. * * * To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

In *Dodge v. Mission Tp.*,¹⁴ the Circuit Court of Appeals held void a statute that authorized the issuing of bonds to encourage the manufacture of sugar. Sanborn, C. J., said: "It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of life, liberty or property, without due process of law. A prohibition of such a deprivation by the states is found in the Fourteenth Amendment of the Constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. * * * A legislative act which takes, or undertakes to authorize the taking, of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but is an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states and is without legal force or effect."

A great array of authority could be adduced, but the above courts have thoroughly illustrated the principle that the property of one man cannot be taken by mere command of government and given to another man, whether by taxation or tribute. If it could, all sorts of chimerical schemes, all the way from laws compelling members of labor unions to contribute money through state agencies to aid striking members, to laws compelling all wholesalers to pay the credit losses of one another, would be in vogue at the solicitation of interested classes. Any one knows that such policies of government are void.

Is the Banking Guaranty Law a Justifiable Scheme of Mutual Insurance.—But it is said the law is a mutual insurance plan for the benefit of the public. Imposed insurance! Whoever heard of such a thing? Insurance lies and is possible only in contract, yet the depositors' guaranty law assumes to create a mutual insurance by mandate of statute. It is, in fact, an attempt by the state to compel the banks to insure the credit losses of one another. From a legal view-point it is a nullity; from a commercial one, it is disastrous. The commercial world knows that a corporation organized with hundreds of millions of capital for the purpose of insuring credit losses of wholesalers and manufacturers, the best commercial credits known, would eventually come to ruin. The same is true of any mutual plan, as it would encourage and offer a premium upon adventurous and dishonest methods. The perils to which our depositors' fund is liable is much greater than the commercial risks would be. The fund is at the mercy constantly of the incompetent and dishonest banker. They are inevitable as a result of the system. In fact the more incompetent, the greater the temptation to speculative methods. The greater the confidence of the public, and the larger the deposits, the greater the danger to the depositors.

Why should it not be made to extend to all classes and all lines of industry, if good for depositors? Why should not all farm-

ers be compelled to pay crop losses on that basis? In *State v. Township*,¹⁵ the court held that paying money to sufferers for crop failure is unconstitutional. Yet there is no difference between paying money to sufferers from crop failures and paying money to sufferers from bank failures. Or, why not compel all city people to carry a mutual fund with the state to pay the fire losses of one another? In *Lowell v. Boston*,¹⁶ it was held: "It needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."

In the *First State Bank v. Schallenberger*,¹⁷ the Circuit Court of the United States said: "If the state possesses the power to single out a certain form of business activity and compel the citizen who engages in it to pay the losses of strangers, whose only relation to him is that their business is known by the same general name, why may it not require all those engaged in one occupation to pay the losses of those engaged in other occupations? And if the state may require those of one class to contribute to the losses of the same class, it is but a step further to require the fortunate to bear the financial losses of the less fortunate as often as inequality of fortune may arise. The provisions of the depositors' guaranty fund cannot be sustained on the theory that society is discharging an obligation it owes to those pauper classes who have always been regarded as proper subjects of its bounty and care. The creditors of banks are like the creditors of any other debtor, and this act is not confined to the relief of paupers: but payment is required of all depositors, whatever their financial condition may be. * * * This is not accomplished by requiring that A shall pay directly to B, or to B's creditors, a certain sum of money for the financial relief of B, or his creditors: but the same result is effected by a process akin to taxation. It is well settled that the state

(15) 14 Kans. 418.

(16) 111 Mass. 454.

(17) Supra.

cannot, under the form of taxation, take the property of its citizens and give it to build up the private fortunes of others. * * * The act not only attempts to exclude individuals from engaging in the banking business, unless they do so through the agency of a corporation, but also attempts to impose upon them, as a condition to their engaging in that business even in that form, a duty to make good the obligations of all other bankers in the state to their depositors. For the reasons before stated, we are of the opinion that this cannot be done consistently with the Fourteenth Amendment to the National Constitution."¹⁸

Are Certificates Issued in Lieu of Funds "Bills of Credit?"—The last proposition, are the certificates to be issued by the State Banking Board in lieu of funds "bills of credit" will not be more than referred to here.

The act provides that if the emergency assessment shall be insufficient to pay depositors, that the board shall issue interest-bearing certificates, payable at call of board. The Constitution of the United States says that: "No state shall coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts. * *"

In order to illustrate the effect of issuing these certificates, as well as to show the general nature of the act, it may be suggested that the guaranty scheme can best be likened to a chain of Alpine mountain climbers. If one falls and goes into the abyss, the natural tendency is for him to pull in the other to whom he is linked, and for that two to pull in two more, and so on until the entire chain goes down. It may be if only one goes down the others will hold him. If two go it is vastly more difficult.

(18) It cannot be said that the statute is a reasonable regulation of the banking business under the police power of the state. The reason is that the act is violative of the constitution of the United States. As the Supreme Court of the United States said in Central of Georgia v. Murphy, 196 U. S. 194: "The police power of the state does not give it the right to violate any right of the federal constitution."

If several more go down it is morally certain to drag down the whole chain. The mountain climbers may follow their perilous way for awhile, and all may be well and good, but if they follow it with the regularity of the banking business, time only is necessary for their destruction. So it is with banks under state guaranty. If one goes down the rest may save it, but if several go down the results stagger the imagination. What would be the condition of the guaranty fund? What would be the status of the certificates flooding the country? They are to be issued in lieu of funds, to pass from hand to hand, to circulate as a medium of value until called in by the agency of the state government.¹⁹

There is a widespread and erroneous idea that the depositors are guaranteed by the State of Oklahoma. That impression prevails from use of the expression "State Guaranty Law." No fund of the state is created or intended for such purpose, nor is the faith of the state in anywise pledged to the redemption of deposits.

It is well in closing this article to add for the information of the public that the prevalent idea regarding our corporation laws is erroneous. The corporation laws of the state are liberal to all legitimate corporate enterprises, and in no state in the Union is the investment of capital more strongly safeguarded than in Oklahoma. As soon as the hysterics of the misinformed can be overcome, the world will study and admire an estate, at once the most modern, the wisest, and nearest to perfection of any system of jurisprudence in the history of mankind.

ADELBERT HUGHES.

Guthrie, Okla.

(19) Read Houston Ry. Co. v. State, 177 U. S. 376. The present amount of the guaranty fund is \$600,000. The aggregate deposits, \$42,000,000.

PYHICIAN'S AND SURGEONS—EMPLOYMENT IN EMERGENCY CASES.**TEXAS BLDG. CO. v. DR. ALBERT & EDGAR.**

Court of Civil Appeals of Texas, November 24, 1909. Rehearing Denied January 5, 1910.

Where a master employing laborers sends them out under the supervision of a foreman, it clothes him at least with implied authority to do not only such things as may be incident to the work, but all necessary things for the advancement of the master's interests.

RICE, J.: This suit was originally brought in the justice's court by defendants in error Drs. J. W. Albert and C. L. Edgar, a firm of practicing physicians residing at Childress, against plaintiff in error for the recovery of \$175, claimed to be due them for professional services rendered to J. D. Keasler, an employee of plaintiff in error. Judgment was rendered for defendants in error for the amount of their demand, \$25 of which having been remitted, plaintiff in error appealed to the county court, where the case was tried by the court without a jury, resulting in a judgment for defendants in error for the sum of \$150, from which this writ of error is sued out.

The only ground urged for reversal is that the evidence does not sustain the judgment. A brief summary of the evidence therefore is necessary to determine the question involved. Plaintiff in error is a private corporation organized for the purpose of doing a building and construction business, its principal office being in Ft. Worth, Texas, with James J. Taylor as its president and general manager, and at the time of the accident to Keasler it had 10 or 12 crews of men working for it in different sections of the country, one of which was at Childress, who were then engaged in the construction of a storeroom in the yards of the Ft. Worth & Denver City Railway Company, at said place. Wm. Barnes was the foreman of the crew at Childress engaged in said work, and said Keasler was one of the employees working for said company under the direction of said foreman. The duties of said foreman were to superintend and direct the movements of said crew, to employ and discharge men and pay them off; but it was shown that generally he had no authority to employ physicians or surgeons to attend the sick or injured employees. On the morning of May 4, 1907, Keasler, with other employees, was sent by Barnes, the foreman, to unload a car of brick standing on the railway track in the Denver yards. Finding it necessary to move the car a short distance down the track before unloading the brick, Keasler, after the brake had been loosened, started the car to

rolling with a pinch bar. Seeing that the car was likely to go too far before stopping, he ran ahead and stuck the bar in front of the wheel of the moving car, which ran onto the bar, throwing him under the car, running over his legs. Barnes, who was not present at the time, was immediately notified of the accident, and soon arrived on the scene and was informed that some one had already telephoned for a doctor. As Barnes and the other employees of plaintiff in error were carrying Keasler on a litter into his own home some 150 yards from where he was injured, defendants in error arrived in response to said phone call, which had been put in for them by someone whose identity was never established, and, under the direction of Barnes, began at once to administer to his relief. These physicians were the local surgeons of the railway company, and when first called supposed that it was to attend some of its employees. One of the physicians, however, knew both Barnes and Keasler and knew that the one was the foreman and the other the employee of plaintiff in error. It was shown that Barnes, the foreman, was very solicitous for the welfare of Keasler, and seemed to be in general charge and management upon arrival of said physicians, and that he told both of them that he wanted them to do all in their power for him. Keasler was a very poor man, and it is shown that after he had been carried into the house Barnes stated to himself and his wife, who were in distress and grieving over the fact of their poverty, that they need not worry about that, but to get whatever was necessary, and that he would see that it was paid for. It was further shown that Barnes was the highest in authority at this place representing the plaintiffs in error at the time of the accident, and there is testimony to the effect that he offered to secure the services of a specialist, if needed, and further proffered to send the injured man and his family in a Pullman to the hospital at Ft. Worth, but that his wife objected to leaving home. Both of Keasler's legs had been so injured that it became necessary for said physicians to amputate them; but Keasler died within a few days from the effects of his injuries. The general manager of the company, Taylor, who was present at the time of the funeral, paid the funeral expenses from his individual funds. While Barnes did not call in these physicians, yet he testified that he would have done so if they had not already been phoned for when he arrived. He stated that while he told them to do all they could for the injured man, and that he was very anxious in his behalf, still he did not promise them either that the company or himself would pay for their services; but Dr. Edgar testified that he supposed from

Barnes' actions at the time, and what he said, that the company would pay for their services.

The sole question for our determination, then, is whether these facts warranted the court in rendering judgment for defendants in error. Counsel for plaintiff in error confess that they have been unable to find any Texas case on the subject, and, so far as we are advised, it is one of first impression in our state, though there are a number of conflicting authorities in other jurisdictions upon this subject, some of which have been cited by counsel for the respective parties, and will be hereafter noticed. It is true, however, that in the case of *Wills v. I. & G. N. R. R. Co.*, 41 Tex. Civ. App. 58, reported also in 92 S. W. 273, where physicians sued the railway company to recover pay for services rendered to a party who had been seriously injured by one of its trains, necessitating the amputation of his limbs, and where the conductor had employed the plaintiff to render such surgical attention as was necessary and proper, and who did render the same, that Chief Justice Fisher, delivering the same opinion of this court, held that the company was not liable; but it must be observed, however, that that was a case in which the injured party was a trespasser and shown to be drunk at the time of the injury. In closing the opinion the court saw proper to use the following language: "We do not undertake to say what would be the power and duty of a conductor of the railway company where a passenger or employee was injured. Here the party injured was a trespasser"—thereby leaving the question now before the court open.

It seems to be quite generally held, however, that the authorized agent of a railway company, in the event of an emergency, such as accident or injury to one of its employees while in the line of his duty, would have authority to summon a physician to administer to his necessities, and bind the company to pay therefor. (The court then cites a number of railway cases to this effect and argues that a like rule should apply to other corporations), and concludes as below stated. Ed. C. L. J.

The principles of justice and the dictates of humanity, in our judgment, as well as the law, imposed upon the company, under the circumstances disclosed by this record, the duty to furnish the wounded man medical aid; and the foreman acting for it, in the absence of any higher authority, had the implied power to bind the company for the payment of the services of the physicians whom he had employed.

So believing, the judgment of the court below is in all things affirmed.

Affirmed.

Note.—Liability of Employer for Medical Services Rendered to Employee on Request of Agent in Emergency Cases.—We have omitted the court's reasoning from other authority, because we desired to set forth in this annotation other passages than those quoted from opinions, as our purpose is different in some wise from that of the Texas court.

In his commentaries on the Law of Corporations, Judge Thompson says: "An implied power will be ascribed to any corporation employing labor to incur expenses on account of injuries received by its employees in the line of their employment, in the absence of any express statutory grant of such power. This implication rests upon the most obvious grounds of justice and humanity." See sec. 5840.

If this be a correct principle, then it is unnecessary to distinguish between individual and corporation employers in considering whether in an emergency case the representative of an employer may bind his principal. One question with the courts is to say what character of officer or agent may act in an emergency so as to bind the employer. In railroad cases it has been laid down that the only requirement is that the officer be the highest representative of the company present on the scene. Elliott on Railroads, § 222; Clark & Skyles on Agency, § 62. Thus a conductor may bind the company where an injury occurs distant from the chief office of the company. Terre Haute, etc., R. Co. v. McMurray, 98 Ind. 358, 49 Am. Rep. 752; Louisville, etc., R. Co. v. Smith, 121 Ind. 353, 6 L. R. A. 320; Levier v. R. Co., 92 Ala. 258, 9 So. 405. This view is also taken by a late English case in which Bramwell, B., said: "Surely it is reasonable to say that the person who is chief in office where the accident takes place should have authority to do those things which must be done at once and which are presumably for the benefit of the company." Langan v. Great Western R. Co., 30 L. T. (N. S.) 173. This case overrules an earlier case decided in 1849. See Cox v. Midland Counties R. Co., 3 Exch. 268.

But it has been said that this rule does not apply to an ordinary manufacturing corporation. The reason for the distinction is thus stated: "Railroad companies occupy a peculiar position with reference to such matters. Exercising quasi public functions, clothed with extraordinary privileges, carrying their employees necessarily to places remote from their home, subjecting them to unusual hazards and dangers, the law has, by reason of the dictates of humanity and the necessities of the occasion, imposed on such companies the duty of providing for the immediate and absolutely essential needs of injured employees, when there is a pressing emergency calling for their immediate action. In such cases, even subordinate officers are sometimes, for the time being, clothed with the powers of the corporation for the purposes of the immediate emergency and no longer." Chaplin v. Freeland, 7 Ind. App. 678, 34 N. E. 1007. But this Indiana court thus reasoning declined to decide the case before it on any such distinction: It did say it was not prepared to say the general manager had any authority to employ a physician or surgeon for an injured employee, and we conceived this rule would apply to railroad as well as another company, in a general way. There the court said: "Whether or not such an extreme case might

arise as would justify or require the court to impose on individual employers a duty analogous to that imposed on railroad companies it is unnecessary for us to determine. There are here no facts showing an emergency save the necessity for the immediate services of a surgeon. It does not appear but what the injured man had abundant means to provide for himself, nor does it appear that he lacked friends and relatives both able and willing to provide for him."

A Kentucky case cites the Chaplin case approvingly in an action where a foreman in charge of a carpenter shop on a building engaged a physician to attend one of the employees seriously injured. The foreman directed the physician to take charge of the case and the latter attended the employee for several months and sued the company for the entire bill. *Godshaw v. Struck & Bro.*, 109 Ky. 285, 51 L. R. A. 668, 58 S. W. 781. The case affirmed a general judgment for defendant, saying, among other things: "In the first place the services sued for were not confined to the immediate emergency, but lasted during several months. Appellee in the meantime resided in the same city and only a short distance from where appellant lived and it would have been very easy for him to have inquired as to the alleged authority of their foreman to act for them. * * * In this case no necessity is shown why appellee should have selected a physician to treat the injured man during his long confinement, as it does not appear that he lacked friends or relatives, who were both able and willing to do so for him."

In *Meisenbach v. Cooperage Co.*, 45 Mo. App. 232, the question is complicated by circumstances such as existed in the two cases last referred to. The suit was for services extending over a long period and not merely for emergency services, and the case is therefore not of much value. It is certain that a very recent case by the same court held, that the president of a corporation was clothed with an emergency power to pay for an operation upon an injured employee of a manufacturing corporation. *Weinberg v. Cordage Co.*, 135 Mo. App. 553.

In *Holmes v. McAlister*, 123 Mich. 493, 48 L. R. A. 396, 82 N. W. 220, the medical bill was not only for emergency, but also for continuous treatment of a laundry employee. The opinion cites and quotes from the Chaplin case, *supra*, which even as to railroads says that subordinate officers are clothed with the powers of the corporation "for purposes of the immediate emergency and no longer."

Then the Michigan court says: "An employee in a bank, store, or shop or upon a farm, may become suddenly very ill, or in some way seriously injured, so that some foreman or other employee might properly deem immediate medical attendance necessary, and in the absence of the employer, summon a physician. Is the employer liable? We are cited to no authority which so holds. It is doubtful whether such employer would be liable if he himself sent for the physician to attend one of his employees. It is unnecessary, upon this point to express an opinion. We do not hesitate, however, to hold, that, in those avocations of life unaccompanied by dangers, an employer is not liable for the services of a physician summoned by his manager, foreman or other servant to attend an employee in a case of sudden illness or injury,

whatever his moral obligation may be." This court makes a different classification than as between railroads and other employers. It classifies according to occupations being hazardous and not hazardous, possibly a more reasonable classification.

It would appear, then, that there has not been any decision squarely to the contrary of what the principal case holds other than the Holmes case, *supra*. The humanity idea there hinted at is set forth somewhat more at large in the Meisenbach case, viz.: that one running and calling a physician does not make himself liable, because a contrary rule would make a bystander hesitate to perform such an act of humanity. Indeed, it is difficult for us to fix this rule of responsibility on any employer, railroad or other, for what are strictly emergency services according to any principle satisfactory to our own mind. If there are additional services they should be chargeable on the theory that a general officer may thereby save his employer from larger loss. C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Highway—Motor Omnibus on—Skidding.—The driver of a motor omnibus owned by the defendants, in order to avoid running over a boy who had stepped in front of the omnibus, turned the omnibus to the off-side and made every endeavor to stop it. The road was greasy and the omnibus skidded, swung around and struck the boy with its side, injuring him. It appeared from the evidence that a motor omnibus is liable to skid if it is stopped suddenly upon a greasy road. In an action brought against the defendants on behalf of the boy, the jury found that the driver had not been negligent, but they were unable to agree on the question of whether the defendants had committed a nuisance by putting the omnibus on the road. The county court judge refused to enter judgment for the defendants.

Held, affirming the decision of the Divisional Court, reported (1909), 73 J. P. 283, that there was no evidence to go to the jury that the omnibus was a nuisance, and that judgment must be entered for the defendants.—*Parker v. London General Omnibus Company, Limited*. App. Cas. 1909, in London Justice Peace, Jan. 15, 1910.

Negligence—Dangerous Premises—Swing Door in Infants' School.—The plaintiff, a girl of six years of age, sued the defendants, as the local education authority, to recover damages for personal injuries sustained by her owing to the alleged negligence of the defendants in maintaining at their school a heavy swing-door which was dangerous to children. The door was put in by the defendants' predecessors, the school board. The plaintiff, who attended the school, arrived late one morning, and, contrary to the instructions given to a pupil arriving late, the plaintiff entered the room where the other scholars were assembled for call-over. The plaintiff was told by the teacher to leave the room, and this she proceeded to do through a heavy door which swung both ways; and as she was going out by this door, it swung back and

caught one of her fingers, which subsequently had to be amputated.

Defendants received the premises from another who had there conducted the school. The jury found defendants guilty of negligence in allowing the door to remain as it was, and defendants appealed.

The court (Darling, J., and Phillimore, J.), dismissed the appeal, being of opinion that on the findings of the jury the door in question, when erected in the first instance, was, with regard to a child like the plaintiff, a trap, in the sense in which that term had been used in various decisions; and that the defendants, having received the door in that condition, were guilty of negligence in allowing it to remain in the same condition. Appeals dismissed—Morris v. Caravanon County Council, K. B. Div., Dec. 8. 1909.

CORRESPONDENCE.

SERVING WITNESSES AND JURORS BY MAIL OR TELEPHONE.

Editor Central Law Journal:

I enclose you a copy of a circular letter I have mailed to each member of the legislature of our state. I call your attention to that portion relating to the manner of the service of summons on jurors and witnesses. I would be glad for such information as you have as to whether this manner of service is in force in any state in the union.

Very sincerely,

JAMES R. TOLBERT,
Judge Seventeenth Judicial
District Oklahoma.

Arapaho, Okla.

Note: The suggestion of our correspondent is that notification to "the jurors—by personal oral notice, notice over the telephone, by telegraph, by mail, ordinary or registered, in the discretion of the judge of the court ordering the juries—and the witnesses—by personal oral notice, notice over the phone, by telegraph, by registered or ordinary mail, or by delivering to each person named in the subpoena a true copy of the subpoena, at the option of the party for whom the subpoena is issued."

We have to say we do not know of any such plan, but we are perfectly willing to commit ourselves in measured approval thereof, and we wonder, as greatly as did the courtiers who saw Columbus stand the egg on end, why we never thought of it before. The writer has participated in the administration of law in a court whose county sessions brought jurors and witnesses across vast stretches of country at ruinous cost to the public and private parties. Many times diligent efforts to obtain service proved abortive, and at other times the negligence of process servers made such efforts miscarry. We might not be willing to go to the extent our correspondent suggests, but surely we do not see why the mail should not be thus utilized. Also, it might be thought this would suffice for ordinary summons to a defendant.

Statutes and courts recognize the affecting of one's rights by use of the mails in many ways. Thus the mailing of a letter accepting a proposition creates a contract. Some statutes supplement notice by publication by the mailing of a letter, and contempt in disobedience of an

injunction may be predicated on knowledge had prior to service of process. If there is any kind of notice that means no notice at all, in very many instances, such is notice by publication. And yet marriages are dissolved and title to property is divested thereby.

But whatever might be urged against, if anything, against the legal sufficiency of a summons to a party, under some cautionary view of due process of law provisions, the reasoning would not extend to summons to jurors and subpoenas to witnesses not demanded by a party to be served by an officer.

In this way the law would not only move more expeditiously and cheaply but with more certainty, too.

If business uses modern methods, it would seem that tribunals, which decide upon rights and liabilities growing out of business, might come close enough to earth from the upper ether of sublimated thought to apply these methods to their routine.

EDITOR.

HUMOR OF THE LAW.

An Irishman who had spent most of his life as a common laborer, came home one night and said to his wife, "Biddy, I've quit me job." "What are yez going to do, Pat?" "Well, Biddy, I'm going to be a lawyer." "What the devil do you know about law?" "Well," says Pat, "you don't have to know much to be a lawyer." Biddy said, "Well, go ahead Pat." Next day Pat rented an office; bought some old second-hand city directories and other books of that nature; had a sign made (Pat Murphy, Lawyer), and started to do business. He sat in his office three or four days without a client showing up. Just as he was leaving for home one night an Irish woman came in. "Good evening," says Pat. "What can I do for you?" "Well," says she, "I have a case for you." "Be seated," says Pat. "There will a retainer's fee of \$10 before you state your case." The client paid the \$10 and Pat said, "Now state your case, madam." "Well," says she, "I run a boarding-house and have on me place a very fine spring. One of me boarders, who had a spite against me, threw some rubbish in the spring, and I wish to prosecute him." "Aha!" says Pat, "that's a very bad case. You will excuse me while I look up the law." Pat took down a city directory and after spending 15 or 20 minutes looking through the book, slammed it shut, put it back on the shelf and said, "Madam, you have no case at all. I find that a man has as much right to throw rubbish in the spring as he has in the fall."

A man of Spanish descent was once elected justice of the peace at Guadalupe, in Southern Colorado. Before the new justice, who understood but little English, had thought of preparing a marriage ceremony, a couple appeared and asked to be united in the holy bonds of matrimony. The justice required them to stand before him, and, addressing the man, said: "You marry?" The man replied "Yes." Then turning to the woman, the justice said: "You marry?" She also replied, "Yes." The justice thereupon said to both: "Bueno," and the ceremony was concluded.

WEEKLY DIGEST.

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1. Abortion—Degree of Proof.—Absolute certainty in the proof of pregnancy is not required; it sufficing if the evidence support the conclusion beyond a reasonable doubt.—*State v. Stafford*, Iowa, 123 N. W. 167.

2. Acknowledgment—Impeachment.—Evidence of parties that they neither signed nor acknowledged an instrument is entitled to as much weight as that of any other interested witness.—*People's Gas Co. v. Fletcher*, Kan., 105 Pac. 34.

3. Action—Joinder.—If a quarry company and a stone company contracted jointly to furnish rock to defendant, both companies were interested in the cause of action of each to recover the amount due under the contract, so that such causes of action could be joined.—*Balfour Quarry Co. v. West Const. Co.*, N. C., 66 S. E. 217.

4. Adverse Possession—Effect as Against Municipal Corporation.—Under Const. 1890, § 104, adverse possession of a street does not run against a city.—*City of Lexington v. Hoskins*, Miss., 50 So. 561.

5. Possession.—From a finding that a party supposed a fence was on his boundary line, it could not be said that he intended to claim to such fence adversely to the adjoining owner.—*Mayer v. C. P. Lesh Paper Co.*, Ind., 89 N. E. 894.

6. Aliens—Right to Property.—The right given non-resident alien heirs, by a treaty between the United States and Hanover, to sell real estate belonging to their ancestor, carried with it the ownership, such ownership being less than a fee simple absolute, the residue

of the title being vested in the resident heirs, and such residue, upon failure of the condition upon which the non-resident alien heirs took their title, vested a fee-simple title in the resident heirs.—*Ahrens v. Ahrens*, Iowa, 123 N. W. 164.

7. Animals—Knowledge of Viciousness.—Where a person keeps a dangerous animal with knowledge of its vicious disposition, he is liable to any person injured by the animal without his fault, irrespective of whether he was negligent or at fault in securing or taking care of the animal.—*Gordan v. Kaufman*, Ind., 89 N. E. 898.

8. Arrest—Arrest in Civil Action.—Under Rev. 1908, § 625, there can be no imprisonment of defendant under final process in an action in which the ancillary process of arrest and bail on an affidavit charging fraud was sued out, unless the issue of fraud has been expressly submitted and determined against defendant.—*Copeland v. Fowler*, N. C., 66 S. E. 215.

9. Arson—Evidence of Motive.—Hostilities between the families of the person whose dwelling is burned and those accused of the arson are admissible to show motive.—*Clinton v. State*, Fla., 50 So. 580.

10. Assault and Battery—Res Gestae.—In prosecutions for assault and battery and affrays, all that is pertinent to show held to be that which took place at the time or so near thereto as to be part of the *res gestae*.—*State v. Kimbrell*, N. C., 66 S. E. 208.

11. Bail—Deposit in Lieu of Bond.—Where defendant was in *custodia legis* when required to give bail, that he was arrested under a warrant which was inadvertently not signed was no defense to a forfeiture of his bail.—*State v. Mitchell*, N. C., 66 S. E. 202.

12. Bankruptcy—Lien for Rent.—Under Act No. 128, p. 163, of 1894, rent held secured by lessor's privilege for one year, whether the premises be occupied or not the whole time by the officers in charge of the bankruptcy proceedings against lessee.—*I. Trager Co. v. Cavarc Co.*, La., 50 So. 598.

13. Preferences.—That a creditor suspected his debtor to be in embarrassed circumstances, and was anxious to obtain payment of the debt, does not show that he believed the debtor insolvent, and that, by accepting a partial payment, he was getting a preference in the debtor's estate.—*Burnham v. Ft. Dodge Grocery Co.*, Iowa, 123 N. W. 220.

14. Rights of Trustee.—An executed agreement to rescind a contract for the sale of certain of the corporation's stock held not subject to vacation by the corporation's trustee in bankruptcy, even though *ultra vires*.—*Tierney v. Butler*, Iowa, 123 N. W. 218.

15. Banks and Banking—Officers.—The president of a bank being its executive head, the rule that his power is limited to transactions expressly authorized by the directors no longer obtains.—*Bartlett Estate Co. v. Fraser*, Cal., 105 Pac. 130.

16. Benefit Societies—Amendment of Constitution.—An amendment to the constitution of a mutual benefit society, which increased the rate of assessments of a member and reduced the amount of benefits payable, cannot be made without his consent.—*Fort v. Iowa Legion of Honor*, Iowa, 123 N. W. 224.

17. Bills and Notes—Bona Fide Purchasers.—One having such suspicions as to notes that he fears to make investigation held not a pur-

chaser in good faith.—*Iowa Nat. Bank v. Carter*, Iowa, 123 N. W. 237.

18.—**Joint Notes.**—A note which is joint by its express terms must be enforced according to its terms, and Civ. Code, § 1430, providing that an obligation imposed upon several persons may be joint, several, or joint and several, does not apply.—*Bartlett Estate Co. v. Fraser*, Cal., 105 Pac. 180.

19. **Boundaries—Division Line.**—Adjoining owners having agreed on a division line and made improvements thereon and claimed up to the partition fence, they and their grantees were estopped to repudiate the agreement.—*Furst v. Satterfield*, Ind., 89 N. E. 906.

20. **Burglary—Intent.**—To constitute breaking and entering a storehouse with intent to commit a misdemeanor, accused must have intended to commit the misdemeanor in the house; otherwise, the breaking and entering is a trespass only.—*Jenkins v. State*, Fla., 50 So. 582.

21.—**Possession of Stolen Property.**—Where the charge is burglary, proof that property taken from the house burglarized is found in the possession of accused held presumptive evidence of burglary.—*State v. Sparks*, Mont., 105 Pac. 87.

22. **Carriers—Accrual of Cause of Action.**—Under contract of carriage providing for no suit after six months from accrual of cause of action and that giving of notice shall be a condition precedent, the six months do not begin to run until notice is given.—*Chicago, R. I. & P. Ry. Co. v. James*, Kan., 105 Pac. 40.

23.—**Damage to Freight.**—Where a shipment delivered to the carrier in good order is received in bad order, it is presumed that it was damaged while in the carrier's possession.—*Kelly v. Southern Ry. Co.*, S. C., 66 S. E. 198.

24.—**Injury to Passenger.**—In an action by a passenger against a street car company for personal injuries, held, that it was a question for the jury whether the sudden starting up of the car was negligence.—*Hirschberg v. Brooklyn, Q. C. & S. R. Co.*, 119 N. Y. Supp. 492.

25.—**Limitation of Liability.**—Acceptance of goods by a carrier, and agreement to ship them, held not a sufficient consideration for a waiver of the carrier's liability as insurer.—*McIntosh v. Oregon R. & Nav. Co.*, Idaho, 105 Pac. 66.

26. **Chattel Mortgages—Redemption.**—A chattel mortgagor held not entitled to have a balance due him from the mortgagees on a mutual open current account credited on the mortgage indebtedness in determining the amount necessary to redeem.—*Mayhew v. Martha's Vineyard Nat. Bank*, Mass., 89 N. E. 919.

27.—**Sale by Mortgagor.**—That proceeds only paid rent and laborers held no defense to selling a mortgaged crop without the mortgagee's consent.—*Hooks v. State*, Fla., 50 So. 586.

28. **Civil Rights—Equal Privileges.**—A coffee merchant serving coffee at a booth in a food show for advertising purposes, to prospective purchasers, held not liable under the civil rights act for refusing to serve negroes.—*Brown v. J. H. Bell Co.*, Iowa, 123 N. W. 231.

29. **Constitutional Law—Delegation of Legislative Powers.**—A conditional local law must be a complete enactment in itself and be only dependent on the question whether its provision shall be availed of by the people in a particular locality.—*State v. Sawyer County Board of Supervisors*, Wis., 123 N. W. 248.

30.—**Personal Liberty.**—Acts 1891, p. 340, c. 132, prohibiting the wearing of a secret society badge by a non-member, held not in conflict with Const. art. 1, § 4, forbidding any preference to any creed.—*Hammer v. State*, Ind., 89 N. E. 850.

31. **Contempt—Questions of Fact.**—In a proceeding against defendant for violation of an injunction against the sale of intoxicating liquors at a certain place, the finding of the lower court that the liquors sold were intoxicating, based on sufficient evidence, is not reviewable on appeal.—*State v. H. Iligner & Co.*, Kan., 105 Pac. 14.

32. **Contracts—Illegality.**—A contract whereby plaintiff agreed with defendant stockbrokers to influence by his letters the purchase by his client of certain stock in which defendants were interested, held illegal.—*Ridgely v. Keene*, 119 N. Y. Supp. 451.

33.—**Want of Consideration.**—Where the maker of a note, an employee in a Government department, in an affidavit made by him in response to a request from his superior officer for a statement of the amount he would pay monthly in liquidation of the debt, admitted the receipt of \$100 on account of the note, to be repaid in three monthly instalments, but stated that he had just been reinstated in the department, and when he became better settled he would "make an effort to pay monthly instalments on the \$100 until the debt has been liquidated." It was held that this was an acknowledgment of the debt to the extent of \$100, and the debtor having reason to know it would be communicated to the creditor, and as it was calculated to and did influence his action, it was sufficient to relieve the bar of the statute of limitations.—*Littlepage v. The Hale Pub. Co.*, Dist. of Col. App.

34. **Corporations—Purchasing Own Stock.**—A corporation may purchase and hold its own stock, in the absence of some restriction or prohibition in the articles of incorporation.—*Tierney v. Butler*, Iowa, 123 N. W. 213.

35. **Criminal Trial—Former Acquittal.**—An indictment of a fiduciary, under Code 1906, sec. 1436, for embezzlement, having the effect of arraigning him on all acts prior to its finding, held an acquittal thereon was a bar to a prosecution for any single act of embezzlement during the same period.—*State v. Caston*, Miss., 50 So. 561.

36.—**Presence of Accused.**—The absence of accused, on trial for murder, during a part of the time of the impaneling of the jury, held fatal error.—*Warfield v. State*, Miss., 50 So. 561.

37. **Damages—Duty to Reduce Damages.**—In an action on a contract to quarry stone, defendant held entitled to set-off against plaintiff's claim for damages the amount plaintiff had received on a sale of stone to a third person.—*Beattie v. New York & L. I. Const. Co.*, N. Y., 89 N. E. 831.

38.—**Loss of Property.**—In an action against a railroad for loss of a mill by fire set by sparks from an engine, testimony as to the availability of water power as affecting the value of the mill was admissible.—*E. T. & H. K. Ide v. Boston & M. R. R.*, Vt., 74 Atl. 401.

39.—**Mental Suffering.**—Damages for mental suffering may be recovered in an action for assault, though no battery or bodily injury was inflicted.—*William Small & Co. v. Lonergan*, Kan., 105 Pac. 27.

40.—Mental Suffering.—Mental suffering, unaccompanied by bodily injury, is an element of damages in an action for a willful or wanton wrong, or one committed with malice and an intention to cause mental distress.—William Small & Co. v. Lonergan, Kan., 105 Pac. 27.

41. Dismissal and Non-suit.—Unreasonable Delay in Bringing Suit.—Where plaintiff failed to satisfactorily explain her extraordinary delay of seven years in bringing an action for an alleged libel to trial, held, that a motion to dismiss for want of prosecution should have been granted.—*Ingri v. Star Co.*, 119 N. Y. Supp. 502.

42. Divorce—Alimony.—A claim for alimony rests upon the common law obligation of the husband to support his wife during the existence of their marriage, and he is not relieved from the obligation after a marital offense which entitles the wife to a divorce and judgment for alimony.—*Rogers v. Rogers*, Ind., 89 N. E. 901.

43.—Alimony and Suit Money.—Rev. Codes 1905, sec. 4071, held to embrace the entire subject-matter of the allowance of alimony, and, no similar provision being made for the husband, he is not entitled thereto.—*State v. Templeton*, N. D., 123 N. W. 283.

44.—Effect on Tenancy by the Entirety.—A divorce granted to a husband or a wife changes their interest in land as tenants by the entirety to tenants in common.—*Mardt v. Scharmach*, 119 N. Y. Supp. 449.

45.—Support of Children.—Divorce decree held to relieve father of liability to the mother for the support of a son electing to live with her.—*Dickinson v. Dickinson*, Fla., 50 So. 572.

34. Elections—Ballots.—Rejection of the ballots voted in the precinct where the election law was flagrantly violated would not be set aside on appeal in an election contest.—*Rampendahl v. Crump*, Okla., 105 Pac. 201.

47. Electricity—Joint Liability.—Electric railway and telephone company held jointly liable for the killing of a horse by contact with a wire of the telephone company which had fallen across a wire of the railway company.—*Eining v. Georgia Ry. & Electric Co.*, Ga., 66 S. E. 237.

48. Eminent Domain—Construction of Statute.—The statute relating to damages to "landowners" for land condemned held to apply to a lessee.—*Woodstock Hardwood & Spool Mfg. Co. v. Charleston Light & Water Co.*, S. C., 66 S. E. 194.

49.—Fees in Street.—Where an owner of land sold lots so as to retain a fee in the street, the abutting lot owners were entitled to only a nominal award in proceedings to condemn the fee.—*In re Decatur St. in City of New York*, N. Y., 89 N. E. 829.

50. Estoppel—Pleading.—A mutual benefit society could not set up waiver or estoppel to deny the validity of an amendment to the constitution, where it did not plead such estoppel, in an action against it for breach of contract.—*Fort v. Iowa Legion of Honor*, Iowa, 123 N. W. 224.

51. Evidence—Ancient Records.—Ancient surveys of a city, appearing on the county records, are presumed to have been recorded by authority, though not formally certified.—*City of Lexington v. Hoskins*, Miss., 50 So. 561.

52. Executors and Administrators—Action to Recover Assets.—In an action by an administrator for conversion of personality of decedent where judgment was rendered for plaintiff, held error to direct that, if there was sufficient

personality to pay the debt and costs, the property should be returned to defendants.—*Vaughn v. Browne*, Kan., 105 Pac. 30.

53.—Sale of Real Estate.—Power to sell a testator's real estate being given by his will to the executors, or their survivor or survivors, the power of sale vested in the only one to qualify, and her conveyance under such authority was effectual.—*Heiferman v. Scholder*, 119 N. Y. Supp. 520.

54. Exemptions—Waiver.—The object of the exemption statute being to preserve to indigent families household articles necessary to subsistence, a waiver of the exemption as to any part of the exempted property would be invalid as against public policy.—*Watertown Nat. Bank v. Bagley*, 119 N. Y. Supp. 592.

55. Fire Insurance—Action Against Railroad Company.—An action against a railroad for loss by fire of property covered by a fire policy held properly brought in the name of the owner alone, though the insurer has paid the policy.—*B. T. & H. K. Ide v. Boston & M. R. R.*, Vt., 74 Atl. 401.

56.—Mortgage Clause.—A mortgage clause in a fire policy held to secure to the mortgagor right to recover regardless of subsequent breaches of contract by the owner of which the mortgagor was ignorant.—*People's Sav. Bank v. Retail Merchants' Mut. Fire Ins. Ass'n* of Iowa, Iowa, 123 N. W. 198.

57.—Ownership of Property.—A vendee of land occupying it under an executory contract of purchase, on which he has paid a portion of the price, and on which he has erected a building, held an "unconditional and sole owner" in fee simple within the condition of a fire policy.—*Jordan v. Hanover Fire Ins. Co.*, N. C., 66 S. E. 206.

58. Fixtures—Removal.—Where machinery installed upon a mining claim by the purchaser under a contract, which was subject to forfeiture on nonpayment of installments of the purchase price, remained personality of the purchaser, he could remove it at least at any time before possession of the claims was surrendered to the vendor upon forfeiture of his rights under the contract.—*Gasaway v. Thomas*, Wash., 105 Pac. 168.

59. Gaming—Bucket Shops.—Transactions in a "bucket shop" held not a "game of hazard," and a telegraph wire, blackboard, and ticker not a "gambling device," within Cr. Code, sec. 214, allowing a person to recover his loss because of a gambling device, or at a game of hazard.—*Ives v. Boyce*, Neb., 123 N. W. 318.

60.—Prosecution.—In a prosecution under Laws 1909, p. 122, c. 92, for aiding and abetting in the reporting and recording, etc., of a bet as to the result of a horse race without the state, it would be immaterial whether the transaction was completed within or without the state.—*State v. Rose*, Mont., 105 Pac. 82.

61. Highways—Alteration.—Proper road notices by petitioners to alter a highway were conditions precedent to giving the county court jurisdiction to alter the highway, and the court has no jurisdiction to do so where it did not find that the subscribers to the notice resided in the road district where the road was to be laid out, as required by Laws 1908, p. 263, sec. 7.—*Jensen v. Curry County*, Or., 105 Pac. 96.

62. Homicide—Drunkenness.—Drunkenness may reduce a homicide from murder to manslaughter, if so extreme as to prevent the existence of an intent to kill.—*State v. Rumble*, Kan., 105 Pac. 1.

63.—Involuntary Manslaughter.—To point a pistol at another intentionally, save in the instances excepted by Pen. Code 1895, sec. 343, held unlawful; and, if the pistol is accidentally discharged, the person pointing it is guilty of involuntary manslaughter.—*Leonard v. State*, Ga., 66 S. E. 251.

64.—Motive.—In a prosecution for homicide, evidence that defendant immediately after the killing compelled decedent's widow to have intercourse and robbed her of certain jewelry held admissible to show motive.—*People v. Barabuto*, N. Y., 89 N. E. 837.

65. Husband and Wife—Tenancy by the Entirety.—The interest in land of a husband as tenant by the entirety is subject to sale on execution; the purchaser taking subject to the wife's right of survivorship.—*Mardt v. Scharmach*, 119 N. Y. Supp. 449.

66. Interest—Action for Purchase Price.—In an action to recover an alleged balance of the purchase price of land sold on an oral contract made 20 years before providing for 10 per cent interest, which rate was claimed to have been reduced to 8 per cent in 1902, only 6 per cent could be recovered under the statute.—*Tillotson v. Seal, Iowa*, 123 N. W. 222.

67. Money Paid—A payor of money on the request of another held entitled to interest from the date of payment.—*Mahew v. Martha's Vineyard Nat. Bank, Mass.*, 89 N. E. 919.

68. Intoxicating Liquors—Defenses as to Illegal Sale.—It is no defense that a person charged with violating an injunction prohibiting the sale of intoxicating liquors in a certain building did not know the liquors were intoxicating.—*State v. H. Illgner & Co., Kan.*, 106 Pac. 14.

69. Mulec Law—Sales of liquor to a liquor firm which has not filed, in compliance with the mulec law, a resolution of consent by the city in which it is doing business, are illegal.—*Arie v. Dixon, Iowa*, 123 N. W. 173.

70. Remonstrance Against Traffic—A sufficient remonstrance against a liquor license not only determines for two years power to grant a license within the district, but also fixes for a like period the status of all signers as remonstrators, and a subsequent effort to withdraw is wholly nugatory.—*Behler v. Ackley, Ind.*, 89 N. E. 877.

71. Judgment—Conclusiveness.—Judgment pro confesso against intervenor upon failure to file an answer or cross-bill within the time required held only to preclude the right to intervene, and not to conclude intervenor upon any matter which might have been put in issue.—*Keane v. Pittsburgh Lead Mining Co., Idaho*, 105 Pac. 60.

72. Persons Concluded—Where a landlord was not concluded by a judgment against the tenant in ejectment, subsequent purchasers from the landlord were also not bound thereby.—*Ditlinger v. Miller, Kan.*, 105 Pac. 20.

73. Landlord and Tenant—Agreement to Give Possession.—Agreement in deed to give possession on a certain date which was the next day after expiration of lease of the premises held not to bind grantor to remove tenant and place grantee in possession.—*Beakey v. Schwitzgebel, Kan.*, 105 Pac. 12.

74. Existence of Relation—A contract between a theatrical company and the owners of a theater held not to create the relation of landlord and tenant.—*Thomas v. Springer*, 119 N. Y. Supp. 460.

75. Necessity of Surrendering Possession—Held incumbent on a tenant to deliver the property to the landlord to terminate liability for rent.—*I. Trager Co. v. Cabaroc Co., La.*, 50 So. 598.

76. Option to Purchase—An option in a lease giving lessee the right to purchase during the term held supported by the consideration paid for the lease, and irrevocable during the term.—*Harper v. Runner, Neb.*, 123 N. W. 313.

77. Larceny—Possession of Stolen Property.—Mere possession of recently stolen property held not sufficient to convict the possessor of larceny.—*State v. Sparks, Mont.*, 105 Pac. 87.

78. Libel and Slander—Pleading.—The facts relied on to justify a libelous charge must be pleaded; a general averment of the truth of the libel not amounting to a justification, unless the libel consists of a specific statement of fact.—*Connors v. Collier*, 119 N. Y. Supp. 513.

79. Master and Servant—Contributory Negligence.—An employee of an electric light and power company employed to repair damages in the system held guilty of contributory negligence.—*White v. Thomasville Light & Power Co., N. C.*, 66 S. E. 210.

80. Guarding Dangerous Machinery—Where plaintiff was ordered to work at an unprotected knot saw, by direction of the foreman, it was not obligatory on him to provide or change the

guard.—*Benner v. Wallace Lumber & Mfg. Co., Wash.*, 105 Pac. 145.

81. Injury to Third Person—The owner of a theater held not to be a partner of a theatrical company giving a show in the theater, so as to render him liable for injury to a patron from an act of an employee of the company.—*Thomas v. Springer*, 119 N. Y. Supp. 460.

82. Negligence—A master held not negligent in not having in place of a plug in the end of a steam pipe connected with a paper manufacturing machine, a cap which would withstand a high pressure turned into it by mistake.—*Utter v. International Paper Co.*, 119 N. Y. Supp. 493.

83. Safe Appliance—A master held not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition.—*Arkansas Smokeless Coal Co. v. Pippins, Ark.*, 122 S. W. 113.

84. Municipal Corporations—Defective Streets.—A traveler on a street at night held required to use greater care than a traveler by day; and, in determining the question of his negligence, the jury may consider his health and soundness.—*Dunkin v. City of Hoquiam, Wash.*, 105 Pac. 149.

85. Public Improvements—Where the alleged illegal part of an assessment is susceptible of reasonable ascertainment, the property owner may not sue to annul the alleged illegal part unless he first pays or tenders the legal tax.—*Hildreth v. City of Longmont, Colo.*, 105 Pac. 107.

86. Special Assessments—Upon application for judgment against several tracts of land to enforce special assessments based upon but one assessment roll, one general judgment only should be entered.—*In re Treasurer of Stillwater, Minn.*, 123 N. W. 289.

87. Negligence—Consequential Injuries.—One negligently setting out a fire held liable for the consequent injuries, though caused by changes in the direction of the wind.—*E. T. & H. K. Ide v. Boston & M. R. R., Vt.*, 74 Atl. 401.

88. Contributory Negligence—Defendant cannot assert prejudice in omitting to charge specifically on contributory negligence, where the court charged that plaintiff was guilty thereof as a matter of law, and that defendant could only be held liable in the event of a finding in plaintiff's favor under the "last fair chance" doctrine.—*Grosjean v. Chicago, M. & St. P. Ry. Co., Iowa*, 123 N. W. 162.

89. Parent and Child—Gifts.—A conveyance by an attorney in fact to himself held not valid on the theory of a presumptive gift, or on the theory of a transfer supported by a consideration of natural love and affection.—*In re Acken's Estate, Iowa*, 123 N. W. 187.

90. Parliamentary Law—Adoption of Resolution.—Generally speaking, and in the absence of a statutory or charter restriction, a majority is all that is required for the adoption of a resolution or order properly arising for the action of a collective body exercising administrative functions.—*Kirkpatrick v. Van Cleve, Ind.*, 89 N. E. 913.

91. Partition—Sale of Minor's Interest.—Act No. 25, p. 47, of 1878, held to require a sale, whether public or private, to effect a partition of property in which a minor is interested, to be made of the whole property, and a sale of a minor's interest alone is void.—*Moore v. Gulf Refining Co., La.*, 50 So. 598.

92. Partnership—Dissolution.—Where a contract of partnership provides that each partner shall give a reasonable amount of his time to the business, that one of the partners is permanently incapacitated by sickness is ground for dissolution.—*Barclay v. Barrie*, 119 N. Y. Supp. 463.

93. Existence of Relation—The owner of a theater held not to be a partner of a theatrical company giving a show in the theater, so as to render him liable for injury to a patron from an act of an employee of the company.—*Thomas v. Springer*, 119 N. Y. Supp. 460.

94. Patents—Adjudication of Invalidity.—A final adjudication declaring a patent invalid relieves a licensee from all liability for royalties

claimed to have been earned after he repudiated his license prior to the adjudication.—*Ross v. Dowden Mfg. Co.*, Iowa, 123 N. W. 182.

95. **Perjury—Affidavit for Change of Venue.**—Perjury or subornation of perjury cannot be assigned on an affidavit for change of venue for prejudice of judge.—*Ex parte Ellis*, Okla., 105 Pac. 184.

96. **Pleading—Demurrer.**—The principle beneath the rule that where two or more defendants unite in a demurrer to the complaint, and a good cause of action is stated against one or more, the demurser will be overruled, applies to an answer.—*Beyer v. Buck*, Wash., 105 Pac. 155.

97. **Principal and Agent—Existence of Relation.**—That defendant took in a horse trade notes from plaintiff payable to a third party, held not conclusive evidence that defendant was the agent of such third party.—*Hewitt v. Huffman*, Or., 105 Pac. 98.

98. **Knowledge of Agent.**—Notice to or knowledge of an agent will not be imputed to his principal, where the person claiming the benefit of the notice, or those whom he represents, colluded with the agent to defraud the principal.—*Jenkins Bros. Shoe Co. v. G. V. Renfrow & Co.*, N. C., 66 S. E. 212.

99. **Railroads—Use of Streets.**—A city, which was given exclusive control over streets by Rev. St. 1881, sec. 3161, held empowered to revoke an ordinance authorizing a railroad company to lay two tracks in a street.—*Grand Trunk & W. Ry. Co. v. City of South Bend*, Ind., 89 N. E. 885.

100. **Receivers—Appointment.**—A receiver should be impartial, and it was improper to appoint as receiver the agent of the petitioning creditor, in absence of circumstances showing his special fitness.—*Virginia-Carolina Chemical Co. v. Hunter*, S. C., 66 S. E. 177.

101. **Sales—Breach by Seller.**—A seller's notice to the buyer of inability to furnish the balance of the goods held a breach of the contract.—*Minor's Estate v. Crusel*, La., 50 So. 690.

102. **Specific Performance—Contracts Enforceable.**—Where parties have in their ignorance made a contract not specifically enforceable because against public policy, equity will not make and enforce a new and valid contract for them.—*McMillan v. Wright*, Wash., 105 Pac. 176.

103. **Fraud of Complaint.**—Specific performance will be denied, and complainant left to his remedy at law, if there is reason to suspect fraud.—*Worth v. Watts*, N. J., 74 Atl. 434.

104. **Statutes—Invalidity in Part.**—The invalidity so far as interstate commerce is concerned of the provisions of the employers' liability act does not invalidate its provisions regulating commerce within the District of Columbia and the territories.—*El Paso & N. E. Ry. Co. v. Gutierrez*, 30 Sup. Ct. 21.

105. **Street Railroads—Care Required.**—While the fact that a street car must pass vehicles and persons on the track provided for it is important in determining the reciprocal duties of the parties to use due care, it does not excuse either party from using the care required by the circumstances.—*Wright v. Boston & N. St. Ry. Co.*, Mass., 74 Atl. 1073.

106. **Failure to Stop on Signal.**—If street railroad cars were in the habit of stopping on signal at a certain place, the failure to do so, resulting in the injury to the person signaling, held negligence.—*Trieber v. New York & Q. C. Ry. Co.*, 119 N. Y. Supp. 439.

107. **Sudden Starting of Car.**—A passenger on an electric car held not negligent as matter of law in going to the door as the car approached where she wished to alight.—*Schultz v. Michigan United Rys. Co.*, Minn., 123 N. W. 594.

108. **Subrogation—Right of Vendee.**—Subrogation may be applied in favor of a vendee who has paid the vendor's debt constituting a charge on the land to save the vendee's interest.—*Stitt v. Stringham*, Or., 105 Pac. 252.

109. **When Not Permitted.**—Subrogation is not permitted where the party seeking it has intermeddled with the affairs of defendant, or where it would prejudice the rights of innocent third persons.—*Title Guarantee & Trust Co. v. Haven*, N. Y., 74 Atl. 1082.

110. **Towns—Taxation.**—General taxation by a town for the purpose of building sidewalks and

lighting streets in an unincorporated village is unauthorized.—*McGowan v. Paul*, Wis., 123 N. W. 253.

111. **Trespass—Common Law.**—Whether an action is an action for "trespass" upon real property depends upon what was deemed trespass at the common law.—*Welch v. Seattle & M. R. Co.*, Wash., 105 Pac. 166.

112. **Trial—Scintilla of Proof.**—Where the testimony presents barely a scintilla of proof in favor of the plaintiffs, the trial judge should dismiss the complaint or direct a verdict.—*Cohen v. American Credit Indemnity Co.*, 119 N. Y. Supp. 700.

113. **Trusts—Rule in Shelley's Case.**—The rule in Shelley's case held not to apply because the estate for life and the estate in remainder were never both legal and equitable at the same time.—*Steete v. Smith*, S. C., 66 S. E. 200.

114. **Unincorporated Associations—Embezzlement by Officer.**—An unincorporated association, organized not for trade or profit, but for the elevation of the craft to which its members belonged, the cultivation of friendship, to improve the moral, intellectual, and social conditions of its members, etc., is not a partnership. Where an officer who is also a member of such an association fraudulently appropriates to his own use funds belonging to the association in his hands as treasurer thereof, he is guilty of embezzlement as defined by section 834 of the Code.—*Rhode v. The United States*, Dist. of Col. App.

115. **Usury—Regulation.**—The legislature may regulate the rate of interest and prescribe criminal penalties for the violation of such laws.—*State v. Sherman*, Wyo., 105 Pac. 299.

116. **Vendor and Purchaser—Misrepresentations.**—A false representation by a vendor that the premises were bounded by public alleys is a material one, where the evidence shows that the existence of public alleys would increase the value of the premises to the extent of one-half.—*Shultz v. Redondo Improvement Co.*, Cal., 105 Pac. 118.

117. **Vendor's Lien.**—Equity will not enforce a lien for purchase money reserved in a general warranty deed where a part of the land has been before sold by grantor to other persons without abatement from the purchase money.—*Smith v. Ward*, W. Va., 66 S. E. 234.

118. **Warehousemen—Liability for Loss.**—Warehousemen who stored goods in building less secure than that in which he contracted to place them, held liable for their loss in a fire which did not destroy the latter building.—*Locke v. Wiley*, Kan., 105 Pac. 11.

119. **Water and Water Courses—Rights of Owner of Dominant Estate.**—The owner of a dominant estate is entitled to drain his land into the natural and usual channels provided by nature, though the quantity of water cast on the servient estate may be somewhat increased.—*Parizek v. Hinek*, Iowa, 123 N. W. 180.

120. **Wills—Contest.**—An action by certain legatees to take certain real estate willed to testator's widow from the estate and to recover for themselves, held a contest of the will within provisions forfeiting the legacy of any contesting legatee.—*Moran v. Moran*, Iowa, 123 N. W. 202.

121. **Undue Influence.**—In order to establish undue influence, there must be proof of a pressure which overpowered the mind and bore down the volition of testator when the will was made.—*In re Carithers' Estate*, Cal., 105 Pac. 127.

122. **Witnesses—Confidential Relations.**—The mere fact that a lawyer is called on to write a deed for a grantor does not create the relation of attorney and client within the rule excluding conversations between attorney and client.—*Conklin v. Dougherty*, Ind., 89 N. E. 893.

123. **Cross-Examination.**—A witness having testified on cross-examination that he had been whipping boss at a prison, the court properly refused to require him to state whether he had whipped the named person.—*Tucker v. State*, Ga., 66 S. E. 250.

124. **Impeachment.**—If accused voluntarily becomes a witness, his general reputation for truth may be impeached.—*Clinton v. State*, Fla., 50 So. 580.

Central Law Journal.

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AN AMERICAN CORPUS JURIS—A CRITICISM AND A SUGGESTION.

Three wise men of the east have discovered a star of hope for the legal profession and they are fondly and enthusiastically pressing after it in the hope that it will finally point out some great public benefactor (Mr. Carnegie is invited to consider the honor), who will be willing to give up one million dollars for a foundation of jurisprudence.

These three wise men are more fortunate than their ancient oriental prototypes in this respect, that we know who they are and from whence they come. The first is Mr. Lucien Hugh Alexander, of the Philadelphia bar; the second is Dr. James De Witt Andrews, author of Andrews American Law; and the third is Professor George W. Kirchwey, dean of the Columbia Law School.

The idea which is now revived with a flourish of trumpets, to-wit, the scientific statement of the whole body of the law, is not at all a new one, unless we so consider the unusual feature of an appeal to private benefaction and patronage. Indeed, it is this last suggestion that has aroused the slumbering fires of all enthusiasts who have dreamed this dream for ages past, but were forced to dismiss the vision when confronted with the impracticalities that forbade its realization.

The statement of the plan occupies considerable space in the February issue of the Green Bag. It was prepared originally for the consideration of members of the federal supreme court and afterwards submitted to leading members of the bar be-

fore publication. The memorandum in support of the plan discusses the new propaganda under two heads, 'to-wit': "I.—The imperative demand through more than a century of our history for an adequate statement of our corpus juris; II.—A method for the practical achievement of the desired result."

There is no doubt, as we have often said in these columns, that case law in the United States is overwhelming in its volume and confusing in its contradictions; that the lawyer is burdened by the great multiplication of reports and dismayed by the absence of any scientific correlation of the new rules and principles thus so frequently announced. But even in the face of this condition we have failed to observe any imperative demand for another encyclopedic work of this character, to become a further tax upon the profession, as the only inevitable solution of such a condition which all are agreed is deplorable. In other words, we admit the diagnosis but doubt the efficacy of the remedy prescribed.

All students of jurisprudence are not agreed that we need so much a scientific restatement of the principles of jurisprudence as a more thorough knowledge of them and their application. Mr. W. T. Hughes, of Chicago, author of Hughes on Procedure, a great student of the civil law and the early English common law, gives it as his opinion that the fundamental principles of private law as stated in the Corpus Juris of Justinian have never been superseded, are immutable, and should be more generally studied and applied; that they are enshrined in works like Broom's Legal Maxims and imbedded in the decisions of the early English chancellors; and that they have gradually broken down the harsh rules and customs of our barbarian Anglo-Saxon ancestors upon which the early common law was founded. He avers that Bacon, through his ordinances and advocacy of the civil law maxims had greater influence in

shaping our present common law than Coke and Blackstone, who in their rigid adherence to ancient feudal customs, were reactionary and unprogressive. Whether this view be correct or not, it evidences a divergence of views as to what is or should be a proper basis for a sound legal philosophy that is bound to affect the authority of any synthetical scientific presentation of the law, as thus proposed. So also, such presentation must necessarily be opposed by those who adhere to the tenets of the school so active in Boston, which declares that all rules of law are arbitrary, transitory and temporary.

Moreover, the very colleges in the east, some of which so enthusiastically support this new scheme, have been largely responsible for much of the present disregard for the scientific presentation of the law in the form proposed. The case book system, discarding the works of the masters of jurisprudence and going to the "cases" as the source of the law, has made of the law a practical and often arbitrary system of rules and principles rather than a theoretical and strictly logical philosophy. We are not here attacking the case system of instruction. Indeed, we believe its fundamental conception to be true and that it prepares the lawyer for more immediate success at the bar and makes him fully competent to wrestle with his opponent under our present system of law, whose authority rests on the accumulation of precedent rather than on any abstract general principles to be followed out strictly to their logical conclusion. But we merely here express our surprise that men favorable to this system of instruction should advance such a scheme of condensed scientific treatment of the law, when works of equal merit with anything that could possibly be devised by men of our own day are discarded as sources of instruction in our leading eastern colleges.

We do not wish, however, to be understood as opposed to such a scientific presentation of law as proposed. Indeed, we think it would be superior to any encyclopedic treatment of the law so far devised

and surpassingly interesting. What we do except to, is the statement that such a work is *imperatively* demanded by the profession or that it will, in any material degree, solve any of the serious problems of our present situation or condition. We cannot bring ourselves to any other conclusion than that such a work performed by a board of editors, necessarily diverse in their general conceptions of the whole scheme, will be anything else than a collection of exceptionally valuable monographs on special subjects of law. This is the form a similar scheme in England, headed by Lord Halsbury and a competent board of editors, is already taking.

But we very much favor the suggestion of a million dollar foundation of jurisprudence and we believe such a foundation would prove of inestimable value to the legal profession if the method of research under such foundation took the form, as it does in the case of other sciences, of an analytical rather than a synthetical statement of the law. For instance, special questions of unusual difficulty in the law of evidence could be so exhaustively, scientifically and lucidly examined and discussed by such a scholar as Professor Wigmore, as to settle for all time the law on such disputed points. As a matter of fact, there is among the decisions to-day little disagreement over general principles of law but the difficulty of judge and lawyer is over some special or novel application of the principles of law to some new and unusual state of facts. Around this disputed point the decisions foam and froth like a whirlpool, until some learned judge or jurist settles the question at issue by a thorough and exhaustive discussion of every principle that bears upon the situation and all men see the solution and accept it. If, therefore, we had a foundation somewhere which provided for such exhaustive monographs on live questions of law that are to-day perplexing the American courts, the patron of such a foundation would be indeed doing a service for his country that would be incalculable in its value.

NOTES OF IMPORTANT DECISIONS.

COURTS—FEDERAL DECISION CONFORMING ITSELF TO STATE DECISION.—When the scriptural span of life has been nearly reached and it is still debated in what sorts of things federal courts should or should not exercise their independent judgments in administering state law, it might be reasonably suspected, that there was something of uncanniness about that independence as a principle.

It makes it look like judge-made law, and it does not require a very close scrutiny of careers in that quality of legislation to learn that they flutter in the air long periods before their weary wings are permitted to fold themselves in peace.

These thoughts come to us from reading the unanimous opinion of the United States Supreme Court, delivered by Justice Harlan, on January 3rd, 1910 (not reported), in the case of Kuhn v. Fairmont Coal Company, on a certificate from the Fourth Circuit Court of Appeals. The latter court desired to know whether it was entitled to exercise its independent judgment as to a coal mining lease entered into prior to the rendition of a decision by the Supreme Court of West Virginia. Justice Harlan, speaking for the court, in affirmative reply to the question submitted, reviews and cites a long list of cases, beginning with 2 Black.

There contracts were all held to be within "the general question as to the duty of the federal court to exercise its independent judgment where there had not been a decision by the state court, on the question involved, before the rights of the parties had accrued," as held in Carroll Co. v. Smith, 111 U. S. 556, and Great Southern Hotel Co. v. Jones, 193 U. S. 548.

The very fact that the court professes to lean to state decision in such cases for the sake of harmony, shows that the duty to exercise independence is not an absolute duty to decide a legal proposition on its merits. No state court can afford to announce such a disposition, because it is a maker of precedent, while an accidental jurisdiction can create no rules of property.

The opinion in the Kuhn case feels it necessary to explain away language of the same court in as late a case as East Cent. M. E. Co. v. Central Eureka Co., 204 U. S. 266, 272. There it was said: "The construction and effect of a conveyance between private parties is a matter as to which we follow the courts of the state," citing Brine v. Ins. Co., 96 U. S. 627; De Vaughan v. Hutchinson, 165 U. S. 566.

The court, in thus clearly stating a sound

legal principle, forgets the existence of that independence it says it possesses and gets inferior courts to wondering whether it continues to claim it.

The opinion of Justice Harlan shows among other things, that Justice Lurton has based independence upon "the constitutional right of the complainant, as a citizen of a state other than Ohio, to have its rights as a mortgagee defined and adjudged by a court of the United States," and this court must do this for itself, when there is no settled ruling by the state court. From opinions rendered by this new judge all wishwashiness about comity, etc., etc., ought to be conspicuous by its absence. If independence ought to be exercised, then a proper suitor has an absolute right to its exercise in its fullest scope.

But it is such an anomalous thing for a court not created by a state to be telling state courts that they do not know their own law, that the former court sometimes forgets that it ought to do so.

"Quandoque bonus dormitat Homerus."

THE RIGHT TO PARTITION IN KIND.

Some are born tenants in common, some achieve the status and yet others have it thrust upon them. But, however the relation be brought about, it has been ruled from the earliest times that those who hold property in cotenancy or tenancy in common, are entitled to a division of the property thus held among the respective owners and according to their respective shares or interests. The distinction between cotenants and tenants in common has been done away with in some jurisdictions, and if this were not the case a discussion of their characteristics would not be necessary here. As a general rule it may be said that one holding an actual and unconditioned interest in property has a right to have such a part of that property set apart to him as will equal his interest in the whole and, of course, all the other owners have the right to a similar division. But there is one species of tenancy which, from its very nature, forbids a division by partition. That is a tenancy by the entirety. This is true because neither tenant has a positive and unconditional ownership in any part of the property thus held.

for, upon the death of one, the whole estate vests in the other.¹ Any attempt at partition of such an estate, therefore, must be futile, because the law fixes the status of such a title, and any division which might be attempted could not prevent the legal effect of the whole estate vesting in the survivor upon the death of either tenant by the entirety. •

Where one or more of the part owners is a married man, his wife is endowed in that part owned by him. This, until a division, is an undivided interest in the whole, and the dower right follows this interest. The wife cannot, therefore, interpose any objections to a proceeding for partition for this is but a judicial determination of what land shall be set apart to her husband as his interest.² She is not even a necessary party to a proceeding for partition, since she owns none of the land and has no title thereto except a contingent dower interest.³ If the various owners agree upon a division and exchange deeds in conformity to the agreement and thus effect the partition, or if the division is brought about as the result of an action for partition by any of the part owners, the effect of the division on the dower interest is to place it with that part assigned and set apart to the husband and to extinguish it in every other part.⁴ And, if by reason of some paramount difficulty of a division in kind the property is sold, the wife thereby loses her right of dower.⁵ Of course a wife could not be prejudiced in her dower estate by such a partition as would amount to a fraud upon

(1) Fisher v. Provin, 25 Mich. 347; Meyers v. Reed, 17 Fed. 401; Wright v. Saddler, 20 N. Y. 320; Ketchum v. Walsworth, 5 Wis. 95; Jones v. Chandler, 40 Ind. 588; Den v. Branson, 5 Ired. (N. C.) 426; Kline v. Ragland, 47 Ark. 111; Gibson v. Zimmerman, 12 Mo. 385; Simons v. McLain, 51 Kan. 160; Stuckey v. Keefe, 26 Pa. St. 397; Marburg v. Cole, 49 Md. 402; Rodgers, Dom. Rel., Sec. 186.

(2) Motley v. Blake, 12 Mass. 280; Ward v. Gardner, 112 Mass. 42.

(3) Haggerty v. Wagner, 148 Ind. 625; Holley v. Glover, 36 S. C. 404.

(4) Kunselman v. Stine, 183 Pa. St. 1; Holley v. Glover, 36 S. C. 404; Potter v. Wheeler, 13 Mass. 504.

(5) Weaver v. Greig, 6 Ohio St. 547; Haggerty v. Wagner, 148 Ind. 625.

her rights.⁶ But a partition in the usual course of things as authorized by law, when made in good faith, is not such a fraud.

Sometimes the courts will make division as to one part only. This can not be done arbitrarily, of course, but where only one of several owners wishes a division and the others prefer to preserve their parts in common, an aliquot part will in such instances be set apart to the complaining party and the property remain as to all the others.⁷

It is often objected to a bill for partition that the division cannot be effected without injurious consequences. But this, of itself, is not a sufficient answer to a plea for division. It is indeed rarely that a division can be made with precision. If this were required as an arbitrary condition precedent to a right of partition in kind, there would be few actual divisions except where the parties could agree. To be sure, the partition can always be effected in this manner, but cases of this kind do not, as a rule, find their way into the courts. It is one of the necessary and natural burdens of a cotenancy or tenancy in common that any one or more of the owners may, as a matter of right, seek a division in kind by the courts when this cannot be agreed upon. And the courts never permit ordinary difficulties to stand in the way of such a settlement of the rights and interests of joint owners. As the Alabama court well said: "It may be considered as settled by the great weight of authority that every cotenant is entitled to demand a partition of the common property, although such partition may be inconvenient or injurious. It may be demanded as a matter of right, notwithstanding the difficulties by which a division may be embarrassed, or the mischief it may entail on the property.⁸ And this ruling is well sustained.⁹

(6) Potter v. Wheeler, 13 Mass. 504.

(7) Hobson v. Sherwood, 4 Beav. 184.

(8) Donnor v. Quartermas, 90 Ala. 184.

(9) Scoville v. Kennedy, 14 Conn. 349, 361; Turner v. Morgan, 8 Ves. 148, 145; Morrill v. Morrill, 5 N. H. 134, 136; Mylin v. King, 139 Ala. 319; 1 Story, Eq. Jur., Sec. 656; Adams, Eq., p. 230; Pomeroy, Eq. Jur., Sec. 1389; Freeman, Co-Ten. & Par., Sec. 433; Caldwell v. Snyder, 178

The rule has been carried very far by some cases. In *Turner v. Morgan*,¹⁰ Lord Eldon held that a house and parcel of land upon which it was situated should be divided in kind, allotting to the one-third owner a one-third thereof and to the other owner, the remaining two-thirds. And in *Warner v. Baynes*,¹¹ Lord Hardwick, speaking for the English High Court of Chancery held that mere physical difficulties were no objection to a decree of partition. In *Parker v. Gerard*,¹² it was held that a bill for partition of realty, title to which was not in dispute, "is a matter of right, and there is no instance of not succeeding in it." And Chancellor Walworth in the leading case of *Smith v. Smith*,¹³ said: "I think that partition between tenants in common of real property, in this state, is a matter of right, by the common law as well as by statute, where both parties cannot, or either of them will not, consent to hold and use such property in common." These authorities illustrate and emphasize the policy of the law in allotting in kind property held by two or more in common or cotenancy. There is another reason why partition in kind should be had instead of a sale. One or more of the owners may be infinitely better able to buy the land at a sale than the other. One may be unable to buy at all, and thus he would be put to great disadvantage with his adversary whereby actual injustice would or might follow. In all such cases a sale for division of proceeds will not be ordered unless absolutely necessary.¹⁴ Where all the owners would fare substantially alike by a division, a sale for partition will not be ordered.¹⁵ And where the proof is substantially conflicting as to whether a sale

or division should be decreed, a division will be adjudged.¹⁶ It will be reversible error for a court to order a sale of property for partition without first ascertaining by proper evidence or procedure that partition in kind cannot be made without great prejudice.¹⁷ And it has been held that the injustice of a division must result to both before a sale for partition will be ordered.¹⁸ And there is still a further method adopted by the courts in order to effect a division in preference to a sale for partition. This is by the payment of owelty. This is an amount to be found by the court, from proper proof, which is necessary to equalize the division when it cannot be made with substantial equality. The tenant receiving the less share receives this from the other in order to make the division equal, which, but for this compensation by way of owelty, would be unjust.¹⁹ And in cases where owelty is necessary to equalize a division, it is usually the duty of the court to fix the amount of owelty as a charge upon the interest set apart to the other, to the end that there be no chance whereby the part owner receiving the less share be defeated in the equality of the division by the failure of the other to make good the owelty.²⁰ Where the commissioners appointed to make partition of a large body of land reported a division by awarding one of the parties owelty in the sum of \$1,317.00, and no reason was given by the commissioners why a division more nearly equal could not have been made their report was set aside.²¹ And in any case the money required to equalize a division, must have reference to the time of partition and values at that time.²² While owelty is a proper charge against the larger portion of the

(16) *Royston v. Miller*, 76 Fed. 50, 58; *Mitchell v. Cline*, 84 Cal. 409.

(17) *Moore v. Willey*, 77 Ark. 317, 320; *Keller v. Judson*, 18 La. 282.

(18) *Reeves v. Reeves*, 11 Heisk. (Tenn.) 669.

(19) *Ames v. Ames*, 160 Ill. 599; *Calhoun v. Rail*, 26 Miss. 414, 420; *Smith v. Smith*, 10 Paige, Ch. 470; *Martin v. Martin*, 95 Va. 26.

(20) *Calhoun v. Rail*, 26 Miss. 414, 420; *Martin v. Martin*, 95 Va. 26; *Pomeroy, Eq. Jur.*, Sec. 1389.

(21) *McGhee v. Russell*, 49 Ark. 104.

(22) *Cheatham v. Crews*, 88 N. C. 38.

Pa. St. 420; *Updyke v. Adams*, 22 R. I. 432, 435; *Mitchell v. Cline*, 84 Cal. 409; *Stephenson v. Potter*, 5 N. Y. S. 749; *Parker v. Gerard*, Amb. 236; *Hauessler v. Mo. Iron Co.* 110 Mo. 188; *Walker v. Lyon*, 6 App. D. C. 484.

(10) 8 Ves. 148. 144.

(11) Amb. 589, 591.

(12) Amb. 236.

(13) 10 Paige. Ch. 470, 473.

(14) *Bank v. Housman*, 6 Paige, Ch. 526; *Smith v. Trustees*, 55 N. Y. S. 370, 36 App. Div. 386; *Coach v. Hake*, 49 La. Ann. 458.

(15) *Coach v. Hake*, 49 La. Ann. 458.

land, yet this should be decreed to operate *in rem*, only, and not against the party personally.²³ The division should be made according to the real value, not according to the average value. For the policy of the law is to substitute, for instance, a fourth interest in kind for an undivided fourth in the whole according to value.²⁴ By this means a partition may be equitably effected without regard to the area, average value, etc. If the property is set apart to the several owners and the part set apart to each is substantially equal to his proportion of the value of the whole, this is all a part owner is entitled to claim or insist on.²⁵ Ordinarily, the court will not award sale of the premises upon the bare report of the commissioners appointed to make the partition that the property cannot be divided. They will not be permitted to thrust their conclusion upon the court, but must state the facts to the end that the court may see for itself whether their deductions are tenable or not.²⁶ The fact that the joint property may enhance in value and become more valuable if not divided is no answer to a petition for partition at the instance of one of the joint owners.²⁷ And always the burden of showing the necessity for a sale is on the party asking it.²⁸ So, a bill in equity asking for a sale for partition only, is vulnerable to demurrer, for a part owner cannot ask a sale for division unless the land is not susceptible of division in kind and this fact must be first ascertained from competent proof before a sale for division will be ordered.²⁹ Ordinarily an unimproved parcel of land will be divided instead of sold, unless from the nature of the improvements or its peculiar character, it cannot be divided without great injustice. It has

therefore been properly held that a strip of land five feet wide should be divided.³⁰ And an olive ranch should be divided instead of sold where it is large enough to justify the building of necessary works for the manufacturing of oil or pickling of the olives on each part allotted to the respective owners.³¹ It has been held that a strip of land four miles long and from 2,000 to 4,000 feet wide, lying between an ocean and a bay, should be partitioned in kind.³² In *Smith v. Trustees*,³³ the action was for partition of lands under the Great South Bay, the islands therein, and the water, hunting, hawking, fowling and fishing rights thereunto belonging. The land consisted of several thousand acres under the waters of the easterly end of the bay. Each of the four plaintiffs was seized of an undivided one-eighth part of the property in question, and the defendant trustees the other half. Under this state of facts it was held that partition in kind should be made. As Chancellor Walworth said in a somewhat similar case, "A farm containing 370 acres of land must be very peculiarly situated to render it impracticable to divide it into three parts without great prejudice to the owners; especially when the court may decree a pecuniary compensation to be made by one party to the others for owelty of partition."³⁴ One portion of a tract of land may be more valuable than another. Yet this is by no means a bar, since the property must be divided according to value, and there is no obstacle in setting apart a smaller portion than an equal part where the value of the part thus allotted is greater in proportion to or of the whole than the other, nor, on the other hand, is it any objection that a larger portion must be given to equalize another of less area but greater value.³⁵ Mere inconvenience to the tenants or some of them resulting from a division is no reason why a partition in kind should be denied. These

(23) *Jameson v. Rixey*, 94 Va. 342; *McKinstry v. Carter*, 48 Kan. 428.

(24) *Grimes v. Little*, 56 Ga. 649; *Hunter v. Brown*, 46 Ky. (7 B. Mon.) 283; *Stannard v. Sperry*, 56 Conn. 541.

(25) *Dondero v. Van Sickle*, 11 Nev. 389; *Field v. Hanscomb*, 15 Me. 365.

(26) *McGhee v. Russell*, 49 Ark. 104; *Hensel v. Sturm* (Tex. Civ. App.), 25 S. W. 817.

(27) *Land v. Smith*, 44 La. Ann. 981.

(28) *Mitchell v. Cline*, 84 Cal. 409.

(29) *Dyer v. Vinton*, 10 R. I. 517.

(30) *Davidson v. Thompson*, 22 N. J. Eq. (7 C. E. Green), 83.

(31) *Hayne v. Gould*, 54 Fed. 951.

(32) *Crittenden v. Gates*, 45 N. Y. S. 768.

(33) 55 N. Y. S. 370.

(34) *Bank v. Housman*, 6 Paige, Ch. 526, 546.

(35) *Crittenden v. Yates*, 45 N. Y. S., 771.

disadvantages are necessarily an incident to a joint ownership.³⁶ It sometimes happens that one of the joint owners has placed improvements on the property at his own expense. This, however, is no obstacle to a division. Usually, the part thus improved will be set aside by the court making the partition to the part owner, who has spent his money in thus enhancing the value of the land. This is simply equity and the land, in such a case, should be divided as though no improvements had been made, but the part upon which the improvements are situated should be allotted to him who made them.³⁷ If this is not done, some provision must be made for compensation. If the land can not be divided and is sold, the proceeds should be ordered distributed to the parties according to their respective interests bearing in mind, however, that the part owner who has enhanced the value of the property with his labor or funds will be entitled to the salable value he has added to the land by this means in addition to an equal division according to the salable value without the enhancement.³⁸ And the part owner thus enhancing the value need not have procured the consent of the other owner or owners before he will be allowed compensation for the improvements. One joint owner has as much right, as a general rule, as another to improve the common property.³⁹ Where the property to be divided is in separate parcels it is not necessary that the various owners have a certain part of each tract allotted to them. The respective owners are only entitled to such part of the whole property as would amount to a just and equitable division of the same.⁴⁰

Difficulty is experienced sometimes in partitioning such property as mill plants,

mining interests, etc. Necessarily the portable character of property of this nature, as well as all other, must depend upon the property itself and its surroundings or situation, the use to which it is adapted, etc. In an early Vermont case, which has been frequently cited⁴¹ an effort was made to partition "A saw mill and mill yard, pond and utensils for a saw mill among different owners," and it was held that partition of the same could not be had by a division, as such a partition would destroy the whole. In this case the property had been used by turn according to the interests of the several owners, each owner operating it for a time commensurate with his interest and then turning it over to another to be so used. The court held that so long as the various owners could thus enjoy the use of the property by turn, partition would not be decreed. But the court also stated that whenever any one of the various owners insisted upon a use of the property in excess of his interest and to the prejudice of the rights of the others in their use and enjoyment of the same, partition by sale would be decreed. In another Vermont case the court refused to order either a sale or partition of a small tract of land the value of which consisted chiefly of an ore bed, which for several years had been known to exist in a part of the land.⁴² But it does not appear from the report of the case that the exact location or dimensions of the ore bed was known, and this uncertainty no doubt weighed forcibly against a division. But generally, at the present day, both by statute and by the common law, tenants in common or cotenants have the absolute and arbitrary right to wind up the joint ownership by an action for partition which entitles the part owner complaining to a decree of partition in kind or a sale to the end that a division may be made from the proceeds.

It has been held in a California case⁴³ that a ditch used for mining purposes could not be divided. But the water sought to be

(36) *Scoville v. Kennedy*, 14 Conn. 399; *Donor v. Quartermas*, 90 Ala. 164; *Freeman, Co-Ten. & Par.* Sec. 433.

(37) *Martindale v. Alexander*, 26 Ind. 104; *Green v. Putnam*, 1 Barb. 500, 507; *Swan v. Swan*, 8 Price (Eng. Excheq.), 518.

(38) *Swan v. Swan*, 8 Price (Eng. Excheq.), 518.

(39) *Green v. Putnam*, 1 Barb. 500; *Martindale v. Alexander*, 26 Ind. 104.

(40) 2 Daniel's Ch. Pr. (6th Am. Ed.), 1156.

(41) *Brown v. Turner*, 1 Aik. (Vt.), 350, 354.

(42) *Conant v. Smith*, 1 Aik. (Vt.), 67.

(43) *McGillivray v. Evans*, 27 Cal. 92, 94.

thus divided among different owners ran in a ditch about twenty inches wide and by usage in mining in that locality, it was diverted from place to place and from time to time as the mining work required.

In Illinois it is held that mines in land when opened are, from their nature indivisible, and that neither partition can be made at law nor dower assigned by metes and bounds. That in cases of this kind, the only thing that could be done would be a sale for division.⁴⁴ But this case involved the right of dower in mines, and the court held that a wife was dowable of the mines opened in the life-time of her husband as well as in any mines or strata not opened at all. In Ames v. Ames⁴⁵ it was held that the owner of land had a right to convey the coal and mineral rights in his land and reserve the land proper. That when such a conveyance is made, two separate estates are created. Each may be conveyed by deed and each may be devised under a will. Mining claims have been recognized as legal estates of freehold and subject to partition. Two separate estates and interests being in existence, in principle there can be no difficulty in recognizing separate titles. The owner would have the right to sever the two estates by deed or devise. Where the owner would have that right there is no inherent difficulty in a court of chancery severing the two estates in a partition proceeding, where it is rendered necessary in the interest of justice.

Water and water rights may be the subject of joint ownership such as will authorize partition. Thus, where a mill privilege is owned by two or more, a division of the water will be made in partition according to the ownership of the respective tenants.⁴⁶

Mining land claimed by several cotenants or tenants in common are, of course, liable

(44) Lenfers v. Henke, 73 Ill. 405.

(45) 180 Ill. 525.

(46) Morrill v. Morrill, 5 N. H. 184.

to be partitioned among the several claimants the same as other land.⁴⁷

It occasionally happens that infants are part owners of land which it is desired to divide. It has been held that partition will not be decreed at the suit of an adult against an infant as a matter of right. That the court should first make proper inquiry as to whether the contemplated partition will be to the interest of the minor, and, if not, that partition should be refused.⁴⁸ But this is not the correct rule, unless required by statute. Partition being a matter of right, an infant has no more right or power to compel another part owner to remain in the common ownership than an adult has. The correct rule is, therefore, an infant cannot plead his disability in bar of an action for a division.⁴⁹ On the other hand, an infant may ask partition as well as an adult.⁵⁰ If the parties in interest arrive at an amicable adjustment of their rights and consent for judgment to go in conformity to their agreement, all being *sui generis*, it then becomes binding and permanently fixes the status of the parties with reference to the land.⁵¹ Of course there are many cases where actual partition would be out of the question. Ordinarily a lot with a store on it adapted to use as a whole could not be divided without great prejudice. Cases might also be mentioned where a division in kind would be practically impossible, as, for instance, a case of joint ownership of a horse, dog, etc. But the law is nevertheless jealous of a division in kind when it can be had without great prejudice to the interests of the parties concerned.

W. C. RODGERS.

Nashville, Ark.

(47) Hughes v. Delvin, 23 Cal. 501.

(48) Ames v. Ames, 148 Ill. 321.

(49) Freeman v. Freeman, 56 Tenn. (9 Helsk.), 301; Hooke v. Hooke, 6 La. 472; Cocks v. Simmons, 57 Miss. 188.

(50) Shull v. Kennon, 12 Ind. 34; Tate v.

Tate, 62 Miss. 145.

(51) Coleman v. Coleman, 19 Pa. St. 100.

CARRIERS — MISDESCRIPTION OF FREIGHT.

JENKINS v. ATLANTIC COAST LINE R. CO.

Supreme Court of South Carolina, Oct. 18, 1909.

Where a shipper of cigars not corded and sealed, on which the freight rate was higher than on smoking tobacco, described the shipment as "1 c/s tobacco," and in the waybill as "smoking tobacco," but was guilty of no fraud, deception, or negligence which would have misled the carrier to accept the shipment at less freight than it was entitled to receive, he was entitled to recover for loss of the shipment the value of the actual articles lost with the freight paid.

JONES, C. J.: In this case a magistrate of Sumter county gave judgment against defendant for \$50, the value of a package containing 1,500 cigars, lost while in defendant's possession, and 25c freight paid on said package, together with interest, aggregating \$53.15. The circuit court affirmed this judgment.

The testimony tends to show that on October 20, 1906, defendant received from Finkin-Jordan Company, Charleston, S. C., a package weighing 30 pounds, consigned to R. M. Jenkins, St. Charles, S. C., and described in the bill of lading as "1 c/s tobacco" and in the waybill as smoking tobacco. The freight on 30 pounds of tobacco, or smoking tobacco, or cigars strapped, corded, and sealed from Charleston, S. C., the place of shipment, to St. Charles, in Lee county, the place of destination, was 25 cents; that the freight charge on a 30-pound package of cigars not corded and sealed was 50 cents, as in this case; that, before payment of the freight at the point of destination, plaintiff inquired for "a shipment of cigars," and that the agent collected 25 cents as freight, as the shipment was billed as tobacco; that plaintiff did not know that the freight on the package should be greater than 25 cents at the time of the shipment or payment of freight; that the shipment was never delivered or accounted for in any way; that the value of the cigars was \$50, but the value of 30 pounds of smoking tobacco such as sold at St. Charles market was about \$19.20.

Appellant alleges error in sustaining the refusal of the magistrate to charge the following request: "If the jury believe that the tariff rate of the defendant for freight charges on tobacco between Charleston and St. Charles was \$.25, and the rate of freight on the package of cigars as alleged, weighing 30 pounds, was \$.50, then, if the plaintiff paid only half

the amount of freight due on 30 pounds of cigars—if you believe the package weighed 30 pounds—cannot recover the \$50.25, as the amount of the claim of the shipment in this case." The request was properly refused. If plaintiff was guilty of no fraud or deception, or negligence, which misled defendant into accepting a shipment for less freight than it was entitled to receive, plaintiff had the right to recover the value of the actual articles lost with freight paid, and, in any event, plaintiff was entitled to recover the value (not exceeding amount demanded, of 30 pounds of tobacco reasonably falling within the description "1 c/s tobacco.") Bottum v. Railway, 72 S. C. 378, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. Rep. 610. It was for the jury to determine whether defendant had been misled to its injury by the fraud or negligence of plaintiff or his agents.

The magistrate was requested to charge the jury: "If you believe that the package alleged to contain cigars was billed as tobacco, and was undertaken to be transported by the defendant as tobacco, and same was lost, the jury can only give a verdict for what they find the worth of a package of tobacco of that size and weight is, together with \$.25 paid thereon;" and he modified the request by instructing the jury that tobacco is a general term, and it was for the jury to say what was shipped and what should have been the billing. The request was faulty for reasons already stated. The modification was in harmony with the principle recognized in Bottum v. Railway, *supra*, in this language: "It is quite true that, when a railroad company receives a package marked 'Glass' and makes no inquiry as to its kind or value, it is responsible for any article received coming under the general description of glass." The magistrate was further requested to charge: "That if the defendant company was misled by billing the shipment 'smoking' tobacco, and less care was taken of same by reason of the fact that smoking tobacco was of much less value, if you so find, and that the plaintiff thereby got a less rate of freight by having the shipment billed as smoking tobacco, then I charge you that he cannot take advantage of his own wrong and mistake, and he can only recover the value of what you believe the best smoking tobacco, weighing 30 pounds, is, and the freight paid by him, and he cannot recover for the value of thirty pounds of cigars lost when he shipped them as tobacco." In reference to this request the magistrate modified it as in the preceding request, and further said: "Of course, if you believe that there was any fraud in the transaction, that these parties were underbilling for the purpose of a deduc-

tion in freight that (request) would be all right." Without raising critical objections to the language of the request and the generality of the exception, the practical effect of the modification was to allow plaintiff to recover the value of the articles lost, in the absence of intentional fraud or deception, if the articles lost reasonably fell under the general description given, otherwise plaintiff's recovery was limited to the value as of articles covered by the description. The instructions above as a whole were not in conflict with the principles recognized and enforced in *Bottum v. Railroad*, supra. In that case it was held that a pastel portrait or landscape painting could not be classed as "glass." The distinctions between the two are so wide and obvious that a person of average intelligence giving to the matter reasonable attention would have ground to believe that the carrier would be misled by the description, and in such a case intentional fraud or deception need not be shown, but it is sufficient if the shipper's negligence reasonably misleads the carrier into assuming a risk beyond the compensation. But the distinction between "cigars" and "smoking tobacco" as a basis for separate freight classification and rates, considered with respect to the nature, use, comparative value, and risk, is not so marked that a shipment of cigars as smoking tobacco is of itself evidence of fraud or negligence on the part of the shipper, and, in this connection, it must be remembered that cigars in a corded and sealed package are shipped at the same rate as smoking tobacco. Cigars are nothing but tobacco rolled for smoking, and there was no evidence that the shipper knew any distinction in the classification or rates between cigars and smoking tobacco; in fact, there was testimony to the contrary. The shipper and carrier are not on equal terms of knowledge in the matter of classifications of freight and rates, and the superior knowledge of the carrier makes it fair and reasonable that the carrier, in close classifications of articles falling under a general term, should make inquiry of the shipper to avoid mutual mistakes.

The magistrate further charged: "As a general proposition, when a railroad company loses anything, the highest price of the article at the point of destination, with the freight added, is the true measure of damages." The objection to this charge is that it intimated to the jury that the railroad company was responsible for the price of the articles, and that they were cigars. This was a statement of a general proposition of law, and is not amenable to the specific objection assigned. The general rule undoubtedly is that for loss of goods a car-

rier is responsible to the owner for their value at the place of destination. *Turner v. Railroad*, 75 S. C. 61, 54 S. E. 825, 7 L. R. A. (N. S.) 188. It is not contended here that by the terms of the contract the value at the place of shipment is the measure of damages. In this case the testimony tended to show the value at the place of shipment, and in *Deschamps v. A. C. L.* (manuscript decision at this time) 65 S. E. —, we have held that to this value freight paid may be added.

It is further contended that a new trial should be had or a reduction of the verdict to the extent of 25 cents, inasmuch as the evidence showed that the proper freight due was 50 cents, whereas plaintiff had paid only 25 cents. This contention, although seemingly small, is made in view of the fact that, if plaintiff should recover less than the amount claimed, no penalty could be recovered. It cannot be sustained, however, as no claim for freight is made in the answer, and there is no testimony that defendant rendered any service entitling it to retain the freight received or to demand further freight.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

WOODS, J. (dissenting). The judgment of the court in this case seems to me to be at variance with the principles stated in *Bottum v. C. & W. C. Ry.*, 72 S. C. 375, 51 S. E. 985, 2 L. R. A. (N. S.) 773, 110 Am. St. Rep. 610, and for that reason I dissent. It is true that cigars are made of tobacco, but commercially tobacco and cigars are generally recognized as different articles, falling under a different classification, just as cotton or wool and cloth are different from clothing. It seems to me unjust to allow a shipper to deliver to a carrier a package not open to inspection, and recover for it as cigars.

NOTE—Amount of Freight Charge Determining Measure of Damages for Loss or Right of Recovery.—It seems to us that the conclusion arrived at by the court in the principal case is correct, but our method of reaching the same result differs from that pursued in the opinion. If the package was not "corded and sealed" and it was plainly revealed that the shipment was cigars, the carrier had no right to extend to the shipper and the shipper no right to receive a lower rate. *Wentz-Bates Merc. Co. v. Union Pac. R. Co.* (Neb.), 123 N. W. 1085.

The fact of payment of the lower rate at destination, before discovery of loss, would not change this, because the carrier could, even in the face of its receipt, retain the shipment in assertion of its lien for the part of the freight unpaid, at least so we conclude from the case just cited.

The interesting question is, however, as to the rule of recovery, where the contents are not known and where articles of the same general

description differ in quality and value, and freight rates are based on supposed value.

As to cases where contents of packages are unknown there seems a conflict in decision. Thus we find in a Georgia case the following statement: "Plaintiff in error makes the point that, since the articles were described in the bill of lading as 23 cases of gum, when as a matter of fact the package contained cutlery, jewelry and other articles of more value than chewing gum, the carrier is released on the theory that any fraud or concealment of the shipper by which the goods are misdescribed, discharges the carrier's liability. The validity of the abstract proposition is unquestioned, but we do not think it is applicable to the facts of the present case." The court gives certain reasons why the proposition does not control and then says: "The case is therefore differentiated from" a case alluded to next below. *Central of Ga. Ry. Co. v. Jones*, 66 S. E. 492. The case next above referred to is *Southern Express Co. v. Pope*, 5 Ga. App. 689, 63 S. E. 809. In this state the syllabus is the decision, and the syllabus of this case says: "A shipper tendering to a carrier for transportation an article of unusual value, not apparent from a casual inspection of the package as tendered, is in duty bound to disclose to the carrier the nature or the value of the article. A failure to so disclose, even though inadvertent and without any dishonest intent, is in law deemed such a fraud as to absolve the carrier from liability for the loss of the property. If an interstate carrier is involved, the provisions of the interstate commerce law are such as to emphasize the duty of the shipper to disclose the value of the articles delivered for transportation." Judge Powell of the court set forth in an opinion the facts of this case. A motion for rehearing was made and Judge Powell in his opinion on that said: "The chief insistence on the motion for rehearing is that the court awarded a reversal, whereas it should have affirmed the judgment, with direction that the plaintiff write off from the recovery all but \$5, the value at which the express company took the package for shipment." * * * The express point now presented was before the Supreme Court in the case of *Wood v. So. Ex. Co.*, 95 Ga. 451, 22 S. E. 535, and there it was held that the effect of the constructive fraud which arises from the failure to disclose the contents of a package really valuable, but seemingly not so, is not merely to reduce the recovery, but to defeat all right of recovery. * * * The rationale of the rule is this: "The concealment of the value is construed to be a fraud and fraud avoids, not modifies, the contract. The reason is more concretely sometimes thus: Thieves and untrustworthy employees are not so likely to steal a package not worth over \$5 as they would be to steal a package worth \$150 or other large sum, though stated to be of the value of \$5 or other small sum." This may in general be said to fairly cover cases on this side of the rule. The principle is thus stated in *Story on Bailments* (9th ed.), 565: "It is the duty of every person sending goods by carrier to make use of no fraud or artifice to deceive him, whereby his risk is increased or his care and diligence may be lessened. And if there is any such fraud or unfair concealment, it will exempt the carrier from responsibility under the contract, or more properly speaking, it will make the contract a

nullity." The federal supreme court takes this formulation of the principle as the basis of a discussion in the case of *Humphreys v. Perry*, 148 U. S. 627, saying: "There is a uniform series of cases on this principle in the supreme judicial court of Massachusetts," and it reviews them and many other cases. These were all baggage cases and what was not baggage was held not recoverable, in value.

Now it has been held that real value must be stated and the statement of a lower value to obtain a less rate does not cut off all recovery, but it is limited to actual value. The common law rule is this way. *Durgin v. Am. Ex. Co.*, 66 N. H. 217, L. R. A. 453, citing a number of cases. The Supreme Court of Kansas held recovery could be had upon limited valuation. *Pacific Ex. Co. v. Foley*, 46 Kan. 467, 12 L. R. A. 799, 26 Am. St. Rep. 107. See also *Douglass Co. v. Minn. Transfer R. Co.*, 62 Minn. 288, 30 L. R. A. 860; *U. S. Ex. Co. v. Koerner*, 65 Minn. 540, 33 L. R. A. 600; *Pac. Ex. Co. v. Pitman*, 30 Tex. Civ. App. 626, 71 S. W. 312. These cases related to undisclosed contents, but it has also been ruled that an agreed valuation may be put upon articles which are shipped openly. Thus a fine horse shipped as ordinary stock: *Duntley v. Boston & M. R. Co.*, 66 N. H. 263, 9 L. R. A. 449, 49 Am. St. Rep. 610; *Alair v. N. P. R. Co.*, 53 Minn. 160, 19 L. R. A. 764, 39 Am. St. Rep. 588. And where a cow worth \$5,000 was estimated by carrier and shipper at \$75, there being an additional charge of 50 per cent for every \$75 more. *Hill v. Boston R. Co.*, 144 Mass. 284, 10 N. E. 826.

Now what influence on all these cases are the anti-discrimination laws? We have seen by the *Wentz-Baker* case *supra*, that an agreement to accept less than legal rate does not prevent enforcing the true rate. Take the contention made in the *Pope* case *supra*, which the Georgia court, deciding as it did on general principle, had no occasion to pass upon. That contention was that a contract to secure a less rate by means of undervaluation was a device prohibited by the interstate commerce law, making the contract between carrier and shipper void.

It is certain that it has been held that an indifference to the prohibitions of these statutes is the same thing as a willful violation. *N. Y. & N. H. R. Co. v. Interstate Com. Com.*, 200 U. S. 56. The government can, therefore, annul contracts on this line. The *Released Rates* case, 13 Interstate Com. Rep. 564, speaks as follows: "We find no impropriety in a graduation of rates in accordance with the actual values of specific commodities. Household goods, for example, differ widely in value, and it is fair to all that the man who ships goods of low value should receive the benefit of a lower rate than the man who ships more expensive goods. Ratemaking on this principle is in every respect legitimate. It is proper to say, however, that the words 'Value limited to * * *' are misleading. The phrase 'Agreed to be of the value of * * *' are less objectionable. They are indicative of the theory upon which these rates are justified—they are fixed with reference to the real value of the property, and not because of an agreement that the amount of recovery shall be limited to an arbitrary standard. We cannot emphasize too strongly our position that these rates must not be used by the carrier as a means for escaping the liability which the law absolutely

forbids it to cast off." Now is the somewhat converse proposition true that the shipper cannot use arbitrary values in obtaining lower rates for escaping liability to pay the published rate? If he does this, does he not nullify his contract so that it cannot be sued upon? C.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Criminal Law—Defense not put to Jury.—D. was convicted under s. 12 of the Places of Religious Worship Act, 1812, as extended by s. 4 of the Religious Disabilities Act, 1846, for wilfully and maliciously disturbing a lawful meeting for religious worship. At the trial the prisoner raised the defense that he was a deacon of the church holding the meeting, and that he was entitled to act in the way he did. This defense was not put to the jury by the judge, and on this ground the conviction was quashed. *Rex v. Dinnick*, Cr. App., Nov., 1909.

It appeared from the evidence that the appellant was a deacon of the "One Holy Catholic and Apostolic Church" at Bristol. When a service was in progress he entered the church with his hat on his head, and standing in front of the communion table called out in a loud voice, "People of Bristol, this is the abomination of desolation spoken of by Daniel the Prophet." In the course of the trial he raised the defense that he was entitled as an officer of the church to make this objection to the service that was in progress.

Alverstone, L. C. J., said: "This applicant during the trial had distinctly raised the question as to his right as an officer of this church to object to the service that was going on, and said that he could not be removed except by the founders of the church. This defense may have been very foolish and unfounded, but that defense ought to have been put before the jury—for this is a paramount principle of our law—that they might have an opportunity of judging whether the appellant had wilfully and maliciously disquieted or disturbed this congregation of persons assembled for religious worship."

Evidence—Handwriting—Opinion of Person not an Expert.—The signature of a transferor to a transfer may be proved by the evidence of a person who is not an expert in handwriting, but who has received documents written by the person whose signature is in question. *Re Clarence Hotel*, Ch. D., Nov., 1910.

Married Woman—Allowance for Wife—Default in Payment—Imprisonment.—On an application to commit a defendant to prison for non-compliance with an order for the weekly payment of maintenance money to his wife under the Summary Jurisdiction (Married Women) Act, 1895, evidence of means is not required in order to give the justice jurisdiction to make an order of committal.—*Rex v. Richardson*, K. B., July, 1909.

Alverstone, L. C. J., said: It is said that that warrant is bad because it does not state that the defendant had means and would not pay the amount ordered.

The case of *Earnshaw v. Earnshaw*, supra, is only a decision that before the order directing money to be paid there must be proof of means. I have no doubt that that decision was right. That refers to an inquiry as to means at the earlier stage and not at the stage when the order comes to be enforced. We are, therefore, thrown back on s. 4 of the Bastardy Laws Amendment Act, 1872, which provides that if the putative father neglect or refuse to make payment of the sums due under an order for maintenance, and if no sufficient distress can be had, the justices may commit the putative father to prison for any term not exceeding three months. It is not necessary to express any opinion whether punishment wipes out past arrears, but my distinct opinion is that it does. This is in the nature of a criminal procedure, and is in effect equivalent to a conviction.

Negligence—Corporation—Invitation to Children to Play in Field.—The defendant corporation owned a field at one end of which was a hedge, on the other side of which was a railway. Children were allowed to play in the field, which had a sand pit in it. The plaintiff, who was not then two years of age, went with some other children to play in the sand pit. She wandered away, and was found injured on the line.

Held, that the corporation were not liable, there being no duty on them to see that children playing in the field did not get on to the line either by the gates of the crossing being left open or by crawling through a gap in the hedge.—*Schofield v. Bolton Corporation*. C. A., Jan., 1910.

Power—Special Power of Appointment—Appointment on Condition.—A lady had power under her marriage settlement to appoint to one or more of her children exclusive of the other or others of them. She had two children, a son and a daughter, and she appointed the whole property to the daughter on condition that the daughter settled the property as to one moiety on herself and her children and as to the other moiety on the son, his wife and children.

Held, that the appointment was a fraud upon the power.—*Knowles v. Morgan*, Ch. D., Dec., 1909.

Ship—Charter Party—Cancelling Clause.—A charter-party contained the following clause: "The charterers, or their agents, have the option of cancelling this charter-party provided the ship is not arrived as within described at Newcastle, New South Wales, by the 15th of December, 1907." Shortly before the 15th of December the charterers were informed by the shipowners that the ship could not arrive by that date, and were requested to state whether they would exercise their option to cancel. The charterers declined to say, and requested the owners to send the ship to Newcastle in accordance with the charter-party. The ship arrived on the 15th of June, 1908, when the charterers exercised their right to cancel.

Held, that the charterers were entitled to exercise their option on the arrival of the vessel, and were not bound to do so at any time prior thereto.—*Moel Tryvan Shipping Co. v. Andrew Weir & Co.*, K. B., Jan., 1910.

Trade Union—Application of Funds—Parliamentary Representation.—A trade union registered under and claiming the benefits of the Trade Union Acts is not at liberty to add to its objects indicated in the statutory definitions of

trades unions and other provisions of those Acts any other object which is not in itself illegal. It is therefore ultra vires a trade union to employ its funds to provide for Parliamentary representation of its members, such an object being wholly distinct from the objects contemplated by the Trade Union Acts.—Amalgamated Society of Railway Servants v. Osborne, H. L., Dec., 1909.

WILL—Gift to Children at Twenty-One—Children Born After Share Becomes Payable.—A testatrix gave certain real property upon trust for the wife of M. for life, and after her death for all the children of M., who attained twenty-one years. Mrs. M. died, leaving four children, all of whom attained twenty-one. Her husband was still living.

Held, that the class to take were the four children living at the death of Mrs. M., to the exclusion of any other children which M. might have.—*Re Canney's Trusts*, Ch. D., Jan., 1910.

ENGLISH NOTES.

By London Law Journal's editor we find the following, which gives some hint of how an English judge who tries a case, while generally an American judge presides in the trial of a case, may be an obstacle to a fair trial:

"A recent critic of the bench attributed some portion of the law's delay to the greater length of the decisions of the judges. Mr. Justice Ridley—who, the other day, adopted the extraordinary course of threatening to leave the bench if a member of the bar who had been engaged but half an hour in opening the defendant's case did not at once call his witnesses—has retaliated by asserting that 'a great deal' of the delay in the King's Bench Courts is 'caused by the length of counsel's speeches,' which, he added, were 'now, much longer than when he was at the bar.' We doubt very much, notwithstanding the greater complexity of litigation, whether counsel's speeches, as a whole, are more verbose than they were. In the biography of Lord Chief Justice North it is written: 'He was careful to keep down repetition, to which the counsel, one after another, are very propense; and, in speaking to the jury on the same matter over and over again, the waste of time would be so great that, if the judge gave way to it, there would scarce be an end, for most of the talk was not so much for the causes as for their own sakes, to get credit in the county for notable talkers. And his lordship often told them that their confused harangues disturbed the order of his thoughts.' Even Mr. Justice Ridley would, we imagine, hesitate to speak of the present members of the bar in such sweeping terms as these. A practice which undoubtedly has become more common is the interruption of counsel. 'If judges,' Lord Halsbury once said, 'would only appreciate what an invaluable assistance it is to their minds to listen to those who have prepared their arguments, and are perfectly familiar with the facts, they would recognize that initial listening, at all events, is most desirable.' Lord Halsbury is not alone in perceiving how disadvantageous the interruption of counsel may be. 'A garrulous judge,' Lord Alverstone took occasion to observe not long ago, 'is an intolerable nuisance, because he lengthens the proceedings and diverts attention from the points in the mind of the advocate.' To

threaten to leave the court if an advocate does not bring a speech of half an hour's duration to a close is certainly not the most agreeable way of assisting him in the performance of his duty to the court, as well as to his client."

JETSAM AND FLOTSAM.

CORRECTION.

Our attention has been called, not by Judge Dunn of the Supreme Court of Oklahoma, but by Judge Hayes, one of his associates, to an injustice by inadvertence, done by us to the former in ascribing to the latter the dissenting opinion in the case of *Taylor v. Ins. Co.*, annotated by us in 70 Cent. L. J. 6. Judge Hayes concurred with Judge Dunn, and so did we in our annotation.

We regard that opinion so highly, especially for its implied disapproval of dictum writing and dictum citation as legitimate precedent, that we feel especial satisfaction in making this correction.

BOOKS RECEIVED.

Free Press Anthology. Compiled by Theodore Schroeder. Published by The Free Speech League, 120 Lexington Avenue, New York City. 1909. Review will follow.

Cyclopedia of Law and Procedure. William Mack, LL. D., Editor-in-Chief. Volume 34. New York. The American Law Book Company. London: Butterworth & Co., 12 Bell Yard. 1910. Review will follow.

HUMOR OF THE LAW.

The late Judge Hamlin, former attorney general of Illinois, was once engaged in the trial of a cause before a judge who was not inclined to tolerate tardiness on the part of attorneys. When he adjourned court at noon, he took occasion to impress upon the lawyers that court would reconvene at 1:30 o'clock exactly. He was almost speechless with rage when Mr. Hamlin walked into the court room shortly after 2 o'clock, apparently oblivious of any offense.

"Judge Hamlin," exploded the indignant and outraged court, "your violation of the instructions of this court is most reprehensible. Orders issued from this bench must be obeyed. What do you suppose the people elected me for?"

"Well, judge," drawled Hamlin, his eyes twinkling with merriment, "that matter always has been a mystery to me."

"Now, Willie," said the boy's mother, "before you go to sleep you must try and recall any little sin you committed during the day and be truly sorry for it."

"Yes, ma'am," replied Willie. "I guess I was guilty of usury, for one thing."

"Usury?"

"Yes'm; I found a nickel and used it."

WEEKLY DIGEST.

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1. Accident Insurance—Cause of Death.—In action on accident policy, instruction that, if the death resulted proximately from the accident, plaintiff could recover, though there were other causes that accelerated the death, held error.—*Ward v. Aetna Life Ins. Co. of Hartford, Conn., Neb.*, 123 N. W. 456.

2. Accord and Satisfaction—Liquidated Demand.—Acceptance of check for less than sum due held not to discharge the entire debt in the absence of consideration.—*Nixon v. Kiddy, W. Va.*, 66 S. E. 500.

3. Admiralty—Salvage.—A court of admiralty has jurisdiction of a libel claiming salvage for services rendered by tugs in subduing a fire communicated from the shore to a vessel under repair in a dry dock.—*Simmons v. The Steamship Jefferson, U. S. S. C.*, 30 Sup. Ct. 54.

4. Appeal and Error—Findings of Facts.—Concurrent findings of fact by the two lower courts on the question of infringement of power will ordinarily not be revised.—*Rumford Chemical Works v. Hygienic Chemical Co. of New Jersey, U. S. S. C.*, 30 Sup. Ct. 45.

5.—Harmless Error.—The court on appeal must, as required by Ballinger's Ann. Codes & St. Sec. 6535, disregard technically incorrect errors on questions of practice not prejudicially affecting the party complaining.—*Hawkes v. Hoffman, Wash.*, 105 Pac. 156.

6.—Harmless Error.—The doctrine of harmless error held not applicable to conflicting instructions on a material point.—*Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co., Va.*, 66 S. E. 73.

7.—Record on Appeal.—The court on appeal must determine the case on the record consid-

ered by the court below, and any agreement between counsel must be ignored.—*Brown's Committee v. Western State Hospital, Va.*, 66 S. E. 48.

8. Alteration of Instruments—Deeds.—A deed is not rendered invalid by an alteration made by consent of the parties reducing the interest conveyed from three-fourths to one-half of the property.—*Eadie v. Chambers, U. S. C. C. of App., Ninth Circuit*, 172 Fed. 73.

9. Assault and Battery—Civil Liberty.—That defendants in making a violent assault on a woman did so because she was preventing them from going over a public highway over her land, which she had previously taken possession of and closed, would be no excuse for their acts.—*Nelson v. Hovander, Wash.*, 105 Pac. 173.

10. Assignments—Necessity of Writing.—An assignment of a chose in action need not necessarily be in writing to be valid.—*New Jersey Produce Co. v. Gluck, N. J.*, 74 Atl. 443.

11. Attorney and Client—Contempt.—Criticism of judicial officers, made after the termination of the cause, is not ground for disbarment of an attorney.—*In re Egan, S. D.*, 123 N. W. 478.

12.—Liberty of Speech.—Freedom of speech and of the press does not warrant a vilification of the courts by an attorney.—*In re Egan, S. D.*, 123 N. W. 478.

13. Aliens—Contract Labor.—Congress, by providing in the immigration act a civil action for the recovery of penalty on violation of section 4 of the act did not preclude prosecution by indictment.—*United States v. Stevenson, U. S. S. C.*, 30 Sup. Ct. 35.

14. Bankruptcy—Appointment of Receiver.—Neither the filing of an answer by a corporation in an equity suit, consenting to the appointment of a receiver, nor such appointment, held to constitute an act of bankruptcy.—*In re Edward Ellsworth Co., U. S. D. C., W. D. N. Y.*, 173 Fed. 699.

15.—Constitutional Provision.—The constitutional requirement that a bankruptcy law shall be uniform throughout the United States means no more than that it shall by its terms be applicable alike to all of the states, and does not require uniformity in its operation on the varying rights of debtor and creditor under the laws of the several states. Such provision has no bearing on the right of dower of a bankrupt's wife, which depends entirely on the state laws.—*Thomas v. Woods, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 585.

16.—Conviction for Perjury.—To justify the denial of a bankrupt's discharge on the ground that he made a false oath to his schedules, the evidence must be of sufficiently clear and convincing character to overcome the presumption of his honesty; but it is not required to be of the high degree necessary to sustain a conviction for perjury.—*Remmers v. Merchants'La Clede Nat. Bank of St. Louis, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 484.

17.—Corporations Subject to Act.—A corporation chiefly engaged in conducting the business of a general fire insurance agency is not engaged in a trading or mercantile pursuit, within Bankr. Act, and is not subject to the act.—*In re Moore & Mulr Co., U. S. D. C., W. D. N. Y.*, 173 Fed. 732.

18.—Discharge.—Under rule 41 in bankruptcy in the Eastern district of New York, which requires creditors objecting to a discharge to make a deposit to cover expenses, it is their duty to bring on a hearing, and if they fail to do so the referee or commissioner is justified in dismissing the objections.—*In re Fritz, U. S. D. C., E. D. N. Y.*, 173 Fed. 560.

19.—Jurisdiction of Court.—A restraining order in a bankruptcy proceeding vacated in so

far as it applied to persons outside of the jurisdiction of the court and who had not come within the district of participate in the administration of the estate.—*In re Isaac Harris Co., U. S. D. C., E. D. N. Y.*, 173 Fed. 735.

20.—**Liens.**—A court of bankruptcy has no power to take the proceeds of mortgaged property of the bankrupt, which belongs to the lien creditor, to pay the expenses of the general estate, or the expense of conducting the bankrupt's business through a receiver or the trustee, without the consent of the lien creditor, express or implied.—*In re Clark Coal & Coke Co., U. S. D. C., W. D. Pa.*, 173 Fed. 658.

21.—**Measure of Proof.**—To justify the omission by a bankrupt of property from his schedule on the ground that he acted on advice of counsel, it must be shown that he fully and fairly stated the facts to his counsel, and acted on his opinion on a matter of law only.—*Remmers v. Merchants' Laclede Nat. Bank of St. Louis, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 484.

22.—**Mode of Review.**—The petition of a trustee in bankruptcy, filed in the bankruptcy court, to have certain adverse claims and liens on property belonging to the estate declared void, and for a sale of the property free and clear of the same, has all the elements of a suit in equity, and the decision therein is reviewable by the Circuit Court of Appeals.—*Thomas v. Woods, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 585.

23.—**Mortgage.**—The holder of a first mortgage on real estate of a bankrupt, the validity of which is not disputed, is entitled to payment in full from the proceeds of the property sold by the trustee, with interest to the time of payment, and cannot be required to pay any portion of the general expenses of the bankruptcy proceedings.—*In re Allert, U. S. D. C., W. D. N. Y.*, 173 Fed. 691.

24.—**Nature of Corporate Business.**—Where the business of a corporation, as stated in its charter, included some pursuits which are within and others which are without the operation of the bankruptcy law, whether or not it is subject to the act depends on the principal business in which it was actually engaged at or about the time the petition was filed.—*Cate v. Connell, U. S. C. C. of App.*, First Circuit, 173 Fed. 445.

25.—**Partnership.**—A partnership is a "person" in the sense in which that term is used in the federal bankruptcy act.—*In re Everybody's Grocery & Meat Market, U. S. D. C., D. Okla.*, 173 Fed. 492.

26.—**Pending Application for Renewal of Liquor License.**—An application for renewal of a retail liquor license in Philadelphia, pending at the time of the filing of a petition in bankruptcy against the applicant, passes to his receiver or trustee as an asset of his estate, together with whatever right he may have to a renewal.—*In re Wiesel, U. S. D. C., E. D. Pa.*, 173 Fed. 718.

27.—**Property Vesting in Trustee.**—On the bankruptcy of stockbrokers, the trustee succeeds to no greater rights against their customers, or in property of such customers which comes into his hands, than the bankrupts themselves had.—*In re Meadows, Williams & Co., U. S. D. C., W. D. N. Y.*, 173 Fed. 694.

28.—**Referees.**—Only such orders or findings of a referee in bankruptcy can be reviewed by the district court as are asked to be reviewed by petition filed as prescribed by General Order No. 27.—*In re Clark Coal & Coke Co., U. S. D. C., W. D. Pa.*, 173 Fed. 658.

29.—**Rights of Trustee.**—A trustee in bankruptcy represents all persons interested in the estate, and may enforce in the court of bankruptcy equitable rights existing in favor of certain of the creditors only.—*In re Bothé, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 597.

30.—**Suit Against Stockholders.**—Where plenary suits are necessary to collect unpaid subscriptions from stockholders of a bankrupt corporation, authority given by the bankruptcy court to the trustee to collect such amounts as may be due is a sufficient demand on the stockholders.—*Babbitt v. Read, U. S. C. C. S. D. N. Y.*, 173 Fed. 712.

31.—**Voidable Preference.**—The receiving of

cattle from a bankrupt when insolvent and within four months of his bankruptcy, under a prior contract for their purchase, and the deduction from the price of an advance payment made thereon, held not to constitute a voidable preference.—*Templeton v. Kehler, U. S. D. C., E. D. Pa.*, 173 Fed. 575.

32.—**Banks and Banking—Liens.**—Notes sent to a bank by a correspondent cannot be held by it as collateral to a loan covering an overdraft by virtue of a printed agreement giving the bank power to sell any securities deposited with the bank or which may hereafter be deposited.—*Hanover Nat. Bank of City of New York v. Suddath, U. S. S. C.*, 80 Sup. Ct. 58.

33.—**Brokers—Contracts Enforceable.**—Authority of a broker to procure a purchaser is not authority to enter into an enforceable contract of sale.—*Lawson v. King, Wash.*, 104 Pac. 1118.

34.—**Carriers—Carriage of Dangerous Substances.**—The rule that a carrier need not acquaint itself with the character of goods received for transportation held subject to the exception that it does not apply to dangerous articles, and a carrier receiving dangerous articles must exercise ordinary care to prevent injury to others.—*Gulf, C. & S. F. Ry. Co. v. Fowler, Tex.*, 122 S. W. 593.

35.—**Damages for Delay in Delivery.**—A shipper's damage for delay in delivering goods on their being returned to him held the difference between their market value at the time they should have been delivered and their value when delivery was tendered.—*Norfolk & W. Ry. Co. v. Potter, Va.*, 66 S. E. 34.

36.—**Grant of Exclusive Privileges.**—Under Code 1904, sec. 1294c, subsec. 3, a contract by which defendant railroad gave plaintiff the exclusive right of displaying advertisements on all box cars controlled by defendant, held void as giving an undue and unreasonable preference and advantage.—*National Car Advertising Co. v. Louisville & N. R. Co., Va.*, 66 S. E. 88.

37.—**Limitation of Liability.**—A carrier of live stock cannot contract against its negligence.—*Miller v. Chicago, B. & Q. R. Co., Neb.*, 122 N. W. 449.

38.—**Res Ipsa Loquitur.**—That a passenger was injured in a collision between two parts of a broken mixed train on which he was a passenger raised a presumption of the carrier's negligence.—*Reeves v. Chicago, M. & St. P. Ry. Co., S. D.*, 123 N. W. 498.

39.—**Terminal Charges.**—A terminal charge for delivering car loads of live stock to stockyards in Chicago beyond the carrier's line, if reasonable and separately stated in the schedule, cannot be condemned on the ground that it makes the total charge to the shipper unreasonable.—*Interstate Commerce Commission v. Stickney, U. S. S. C.*, 80 Sup. Ct. 66.

40.—**Charities—Designation of Trustee.**—A will, creating a charitable trust, fails to designate a trustee by name, held not to defeat the trust, where it can be determined whom testator intended.—*Hagen v. Sacriston, N. D.*, 123 N. W. 518.

41.—**Chattel Mortgages—Absolute Transfer as Mortgage.**—In case of doubt whether a written instrument was intended to be an absolute bill of sale, conditional sale, or a mortgage, equity will hold the transaction to be a mortgage.—*Hull v. Burr, Fla.*, 50 So. 754.

42.—**Description of Property.**—Where a mortgage did not locate property otherwise than by giving mortgagor's residence in another state where he formerly resided, it suggested an erroneous location rendering the description ineffectual.—*Joslyn v. Moose River Lumber Co., Vt.*, 74 Atl. 385.

43.—**Foreclosure Bond.**—Where a delivery bond in chattel mortgage procedure is given under Civ. Code 1895, sec. 2766, in support of an affidavit of illegality which is dismissed, the bond is broken by a failure to produce the property for the sale.—*Hogan v. Morris, Ga.*, 66 S. E. 550.

44.—**Validity.**—A chattel mortgage on property described only as "five wagons," when the mortgagor owned more than five wagons, is void for insufficiency of description.—*In re Bothé, U. S. C. C. of App.*, Eighth Circuit, 173 Fed. 597.

45. Citizens—Marriage of Alien Women to Citizen.—The marriage of a woman who is a subject of the Turkish Empire with an American citizen makes her a citizen of the United States, and the fact that after her marriage, and before she reaches the United States with her husband she may have contracted some disease which would have excluded her as an alien, will not warrant her exclusion.—United States v. Williams, U. S. D. C., S. D. N. Y., 173 Fed. 626.

46. Conspiracy—Immigration of Alien Contract Laborers.—Assisting the importation of alien contract laborers is an offense against the United States within Rev. St. U. S., sec. 6440, providing for a punishment of persons conspiring to commit such an offense, as under Act Feb. 20, 1907, c. 1124, such act is a crime.—United States v. Stevenson, U. S. S. C., 30 Sup. Ct. 37.

47. Constitutional Law—Equal Protection.—Acts 1908, p. 687, c. 401, dealing alike with all the citizens committed to a state insane hospital in the matter of support, does not deny the equal protection of the law within the fourteenth amendment to the Federal Constitution.—Brown's Committee v. Western State Hospital, Va., 66 S. E. 48.

48. Police Power.—The legislature, within well-known and well-defined limitations, is the sole judge as to when and how the police power is to be exercised.—State v. Central Lumber Co., S. D., 123 N. W. 504.

49. Police Power.—The fourteenth amendment of the Federal Constitution does not interfere with the exercise of the state's police power.—State v. Dannenberg, N. C., 66 S. E. 301.

50. Repair of Buildings.—An ordinance forbidding the use of a few new shingles to stop leaks in roofs held unconstitutional as an unnecessary attempt to control the use and enjoyment of private property.—Town of Seneca v. Cochran, S. C., 66 S. E. 288.

51. Restricting Municipal Taxation.—Receiver of metropolitan police board of Louisiana held unconstitutional deprived of the right of taxation by the city of New Orleans, which right existed before the enactment of Acts La. 1870, Ex. Sess. p. 10, No. 5.—State of Louisiana v. City of New Orleans, U. S. S. C., 30 Sup. Ct. 40.

52. Contracts—Support and Maintenance.—Where defendant agreed with a girl's father to take the girl and treat her as if she were his own child, he was bound to give her all the care and advantages that would ordinarily be given a natural child by parents under similar circumstances, and would be liable under his contract for failure to do so.—Ottoway v. Milroy, Iowa, 123 N. W. 467.

53. Ultra Vires.—If a contract by a corporation is not within the franchise and powers granted by the state in express terms or by fair implication, it is beyond the power conferred on the corporation by the legislature, and not voidable only, but void and of no legal effect.—National Car Advertising Co. v. Louisville & N. R. Co., Va., 66 S. E. 88.

54. Copyrights—Second Copyright.—Attempted duplication of an existing copyright in a painting by depositing a photograph of the same painting under a new title, held void.—Caliga v. Inter-Ocean Newspaper Co., U. S. S. C., 30 Sup. Ct. 38.

55. Covenants—Persons Bound by Judgments.—It is common practice to give notice to one bound by covenant of title of the pendency of suit involving it, and to appear and defend, and, if he fails or refuses to appear, he is as much bound by the judgment or decree as if he had been formally impleaded.—Norfolk & W. Ry. Co. v. Mundy, Va., 66 S. E. 61.

56. Criminal Evidence—Statement.—Statement by the judge in discharging a jury after having acquitted another defendant for the same offense for which accused was about to be tried, held not ground for continuance.—Smith v. State, Ga., 66 S. E. 556.

57. Criminal Law—Principals.—The civil law of agency has no application to a violation of the criminal law.—Cox v. State, Okla., 104 Pac. 1074.

58. Res Gestae.—Exclamation of a person who had been shot within two minutes after the firing and just prior to his death, held admissible as part of the res gestae.—Williams v. State, Fla., 50 So. 749.

59. Damages—Injuries to Animals.—In an ac-

tion for injuries to a horse, the owner may recover the diminished market value after cure, the reasonable expense of attempt to cure, and reasonable compensation for loss of use, not exceeding the original value.—Wilson v. Seattle, R. & S. Ry. Co., Wash., 104 Pac. 1114.

60. Personal Injuries.—In an action for negligent personal injuries, it is for the jury to determine from the nature and extent of the injury, and the pain and mental anguish thereby caused, what is a reasonable compensation.—Stanton v. City of Parkersburg, W. Va., 66 S. E. 514.

61. Death—Action for Death.—The cause of action for an injury to an employee of an interstate carrier by railroad given by section 1 of the federal employer's liability act of April 22, 1908, does not survive the death of the person injured, and damages for his conscious suffering are not recoverable in an action for his death.—Walsh v. New York, N. H. & H. R. Co., U. S. C. C., D. Mass., 173 Fed. 494.

62. Proximate Cause.—Negligence of the board of directors of a state hospital for insane in discharging a patient cannot be regarded as the proximate cause of a homicide subsequently committed by him, so that they would be liable for damages in the absence of section 4560.—Bollinger v. Rader, N. C., 66 S. E. 314.

63. Deeds—Construction.—A deed will not be construed as a grant on condition unless the language is plain or the intent of the grantor manifest.—Thompson v. Hart, Ga., 66 S. E. 270.

64. Descent and Distribution—Payment of Inheritance.—An heir who comes to a succession under the terms of the Civil Code, and as authorized thereby, must return to his coheirs all that he has received from the common ancestor.—Blank v. Blank, La., 50 So. 745.

65. Dismissal and Non-Suit—Joint Defendants.—Where plaintiff had the right to sue defendants, either jointly or severally, he could, with leave of court, dismiss the action as to one defendant jointly sued.—Ivanhoe Furnace Corp. v. Crowder's Adm'r, Va., 66 S. E. 68.

66. Dower—Rights of Widow.—Coal in place is "real estate" within the meaning of the statute giving the wife dower in all her husband's real estate.—Reynolds v. Whitescarver, W. Va., 66 S. E. 618.

67. Eminent Domain—Injunction.—In an action to enjoin defendant from polluting from its mine a stream running through plaintiff's land, the court could not consider the question as to the balance of the advantage or disadvantage to plaintiff and defendant and the public at large through such use of the stream.—Williams v. Haile Gold Mining Co., S. C., 66 S. E. 117.

68. Equity—Decree.—Where equity is without jurisdiction, held error to dismiss the bill without inserting in the decree a clause saving to plaintiff and defendant the right to prosecute or defend any other proper suits.—Newton v. Kemper, W. Va., 66 S. E. 102.

69. Evidence—Admission of Agent.—Admissions of agents in a suit held not competent evidence against their principals in another suit, in which different issues are involved.—Atchison, T. & S. F. Ry. Co. v. Sullivan, U. S. C. C. of App., Eighth Circuit, 173 Fed. 456.

70. Former Testimony.—Contribution by Corporations to expenses of the defense of a patent infringement suit without right in any way to interfere with the case does not make such corporation a privy to the suit, so as to render admissible testimony in the former suit of a witness since deceased in a suit by the corporation.—Rumford Chemical Works v. Hygienic Chemical Co. of New Jersey, U. S. S. C., 30 Sup. Ct. 45.

71. Judicial Notice.—It is common knowledge that in all cities and large towns the post-office is open for general delivery at certain hours on Sundays, and that there is one delivery by carriers on holidays.—Aetna Indemnity Co. v. George A. Fuller Co., Md., 74 Atl. 369.

72. Easement—Private Right-of-Way.—A private way easement by prescription must be continuous, uninterrupted, and adverse for the necessary period.—Crozier v. Brown, W. Va., 66 S. E. 326.

73. Reservation in Deed.—A reservation of an easement intended to be appurtenant to the land retained by the grantor is not within the

rule that the word "heirs" must be used to create an estate which will extend beyond the grantor making the reservation.—*Ruffin v. Seaboard Air Line Ry.*, N. C., 66 S. E. 317.

74. **Federal Courts—Certificate of Jurisdiction.**—Absence of certificate of question of jurisdiction, held not fatal to the right to maintain a direct appeal from the Federal District Court to the Supreme Court, where, on the face of the record, it is apparent that the only question which was decided below was one of jurisdiction.—*Simmons v. The Steamship Jefferson*, U. S. S. C., 30 Sup. Ct. 54.

75. —Decision on Non-Federal Grounds.—A judgment of a state court adverse to plaintiff in an action setting up a title acquired by purchase at bankruptcy sale, held not to involve the decision of the federal court sustaining a writ of error from the Supreme Court of the United States.—*Corbett v. Craven*, U. S. S. C., 30 Sup. Ct. 64.

76. —Review on Behalf of Government.—A judgment of a federal district court sustaining a demurrer to an indictment on a question involving the construction of a federal statute and a question on the sufficiency of the indictment under the criminal law, is reviewable in the Federal Supreme Court.—*United States v. Stevenson*, U. S. S. C., 30 Sup. Ct. 35.

77. **Fire Insurance—Rights of Mortgagors.**—Where the interest of a mortgagor is the only valid liability under a fire policy, all that is due thereunder being due to him, "as his interest may appear," he can sue thereon, though his interest is less than the face of the policy.—*Bacot v. Phoenix Ins. Co. of Brooklyn*, Miss., 50 So. 729.

78. **Frauds, Statute of—Sale of Standing Timber.**—A contract for the sale of standing timber, contemplating the immediate severance of the trees from the land, converts them into personalty; and the sale is not within statute requiring the sale of an interest in land to be in writing.—*Hurricane Lumber Co. v. Lowe*, Va., 66 S. E. 66.

79. **Homicide—Carving Initials.**—In a murder trial the carved initials on a barn door held admissible to identify accused with the crime.—*State v. Kent*, Vt., 74 Atl. 389.

80. —Provocation.—Where words of decedent are accompanied by acts showing a purpose to do personal violence to accused, accused is entitled to an instruction on manslaughter.—*State v. Crawford*, W. Va., 66 S. E. 110.

81. **Infants—Interest of Guardian Ad Litem.**—The interest of a guardian ad litem in the purchase of an infant's coal, sold in a proceeding in which the infant is represented by him, renders the sale voidable.—*Plant v. Humphries*, W. Va., 66 S. E. 94.

82. —Judgments.—When the court acquires jurisdiction of the subject and person, an infant is as much bound by its decree as an adult.—*McComb v. Gilkeson*, Va., 66 S. E. 77.

83. **Insane Persons—Support.**—The right of the state to recover from the estate of a lunatic for expense of supporting him in a state hospital, held to exist only by statute imposing a personal liability for such support.—*Brown's Committee v. Western State Hospital*, Va., 66 S. E. 48.

84. **Interest—Mistake in Computing.**—In entering judgment on a verdict, interest should be computed from its rendition.—*Tobler v. Union Stock Yards Co.*, Neb., 123 N. W. 461.

85. **Judges—Affidavit of Prejudice.**—Public confidence in the judicial system demands that the cause be tried by an unprejudiced judge.—*Ex parte Ellis*, Okla., 105 Pac. 184.

86. **Judgment—Default Judgment.**—Where a petition prays process against an individual and also a partnership, but the individual alone is served, a default judgment against both held void as to the firm.—*John Holland Gold Pen Co. v. Williams & Co.*, Ga., 66 S. E. 540.

87. —**Res Judicata.**—A decree determining that a deed by a joint tenant was not an issue in a suit to quiet title in favor of the grantees on the ground of adverse possession and dismissing the suit, held no bar to their right to rely on the deed as a defense to grantor's suit for partition.—*Taylor v. Hedrick*, Va., 66 S. E. 65.

88. —**Scire Facias.**—*Scire facias* to revive a judgment is a continuation of the old suit, the writ following the judgment to be revived as to amount, date and parties.—*White's Adm'r v. Palver*, Va., 66 S. E. 44.

89. **Landlord and Tenant—Right of Tenant.**—Tenant held entitled to treat landlord's breach as discharging him from further performance, and to sue on a quantum meruit, and recover for plowing, fencing, cultivating, and improving the premises.—*Roberson v. Allen*, Ga., 66 S. E. 542.

90. **Licenses—Real Property.**—A license in real estate is a grant by the owner thereof, and is as a rule voidable at his will, and hence an exception in a deed does not create a mere license in favor of the grantor.—*Ruffin v. Seaboard Air Line Ry.*, N. C., 66 S. E. 317.

91. **Master and Servant—Injuries to Third Persons.**—Where the owner of a team hires out the team and a driver to another, and such other has, under the contract, nothing to do with the driving of the team, the relation of master and servant still exists between the owner and driver as regards negligence of the driver in driving, and the doctrine of respondeat superior applies.—*Morris v. Trudeau*, Vt., 74 Atl. 387.

92. —**Negligence—Conductor's negligence in giving order to brakeman held the master's negligence, under the employer's liability act of Alabama (Civ. Code Ala., 1896, sec. 1749).—Southern Ry Co. v. Robertson, Ga., 66 S. E. 535.**

93. **Mines and Minerals—Owner of Surface Land.**—For the surface owner to ever possess ion of coal severed in title from land, he must state that he has had actual physical possession of the coal.—*Plant v. Humphries*, W. Va., 66 S. E. 94.

94. **Monopolies—Police Power of State.**—Under the state's police power, the legislature may pass laws to protect the public against monopolies acquired by unfair competition.—*State v. Central Lumber Co.*, S. D., 123 N. W. 504.

95. **Mortgages—Absolute Transfer as Mortgage.**—An instrument will be held a mortgage whatever its form, if, when taken alone or in connection with the surrounding circumstances, it appears to have been given to secure the payment of money, and the mere absence of terms of defeasance is not conclusive.—*Hill v. Burr*, Fla., 50 So. 754.

96. —**Purchase of Mortgaged Property.**—Where trust deed creditor buys the trust property, and takes conveyance from his debtor, his lien is not merged so as to make his entire estate in the land subject to an intervening lien.—*Sullivan v. Saunders*, W. Va., 66 S. E. 497.

97. —**Trust Deed.**—Where liens of unascertained amounts exist prior to a trust deed, preventing a fair sale, the foreclosure of the trust may be enjoined until the same are removed.—*Hart v. Larkin*, W. Va., 66 S. E. 331.

98. —**Validity.**—In an action to cancel a mortgage of partnership property placed thereon by one of the firm, evidence held to show that the mortgage was simulated and fraudulent.—*Union Garment Co., Limited, v. Newburger*, La., 50 So. 740.

99. **Municipal Corporations—Obstruction in Streets.**—Sudden shying of a horse resulting in injury to the driver, by bringing the vehicle in contact with an obstruction in the street, held to render the city liable.—*Rucker v. City of Huntington*, W. Va., 66 S. E. 91.

100. —**Taxation.**—The levy and collection of taxes by the city of New Orleans to satisfy outstanding debt of metropolitan police board held not to exhaust the city's power in the premises.—*State of Louisiana v. City of New Orleans*, U. S. S. C., 30 Sup. Ct. 40.

101. —**Use of Streets.**—In an action for personal injuries caused by a horse which plaintiff was holding in a street becoming frightened at defendant's automobile, defendant held not negligent in not stopping his automobile until after passing the horse.—*Baugher v. Harman*, Va., 66 S. E. 86.

102. —**Notice—Return of Service.**—Indorsement upon copy of the record of a criminal action, purporting to be a return of service thereof by an officer, held not evidence of its delivery, where the officer in delivering it was not acting

within his official duty.—*State v. Emblem*, W. Va., 66 S. E. 499.

103. **Nuisance—Railroad Yard.**—Where a railroad's use of a certain portion of its round-house yard constituted a nuisance, it was no defense for an action for damages by an adjoining property owner that the use was not negligent, and did not exceed the necessities of defendant's business.—*Chesapeake & O. Ry. Co. v. Greaver*, Va., 66 S. E. 59.

104. **Parent and Child—Action by Parent.**—Where father hires minor son to an employer for certain work, and he is put at a more dangerous work, and injured, the father has a right of action against the employer.—*Braswell v. Garfield Cotton Oil Mill Co.*, Ga., 66 S. E. 539.

105. **Payment—Contract Obligation.**—The taking of a new simple contract obligation for a specific debt does not pay the original debt, nor suspend the right of action thereon.—*Dudley v. Barrett*, W. Va., 66 S. E. 507.

106. **Patents—Suit for Infringement.**—In a suit for infringement of a patent laches is a defense.—*Fichtel v. Barthel*, U. S. C. C., 173 Fed. 489.

107. **Payment—Duress.**—A payment of rent under a valid and unreversed order in summary proceedings held not a payment under duress.—*Lawrence v. Edwin A. Dunham Co.*, 119 N. Y. Supp. 725.

108. **Perpetuities—Lives in Being.**—Devising suspending absolute power of alienation for a fixed period, however short, without reference to lives in being, held void.—*In re Rong's Estate*, Minn., 123 N. W. 471.

109. **Post Office—Opening Correspondence.**—One who devises a fraudulent scheme by opening a correspondence with himself by means of a post office is guilty of no offense punishable under Rev. St. U. S., sec. 5480.—*Erbbaugh v. United States*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 433.

110. **Principal and Agent—Authority of Agent.**—A purchase of property at an auction sale by an unauthorized agent not being binding upon the sellers, they could refuse to recognize the sale even after being notified of its ratification by the purchaser.—*Union Garment Co. Limited, v. Newburger*, La., 50 So. 740.

111. **Prohibition—Plea to Jurisdiction of Lower Court.**—As a prerequisite to an application for prohibition to prevent proceedings in the juvenile court, there must have been a plea to the jurisdiction of that court.—*State v. Rose*, La., 50 So. 520.

112. **Public Lands—Town Sites.**—The right of occupants of town site lots fixed by their occupancy could not be diminished by conveyances from the mayor trustee according to the plat filed under Act Idaho, Jan. 8, 1873 (Laws 1873, p. 16), enacted pursuant to Rev. St. U. S., sec. 2387 (U. S. Comp. St. 1901, p. 1457.), providing for the disposal of lots.—*Scully v. Squler*, U. S. S. C., 30 Sup. Ct. 51.

113. **Railroads—Contributory Negligence.**—Where a brakeman, while seated in a car, knew that a delivery track was used jointly by his employer and defendant company, and that defendant delivered cars on the track at that time each evening, his employment did not relieve him from exercising care for his own safety.—*Baltimore & O. Ry. Co. v. Lee*, Va., 66 S. E. 51.

114. **Duty to Run Trains on Schedule Time.**—It is ordinarily the duty of the carrier to run its trains on schedule time and make advertised connections, and it is liable for injuries resulting from a negligent failure to do so.—*Tabor v. Seaboard Air Line Ry. Co.*, S. C., 66 S. E. 292.

115. **Injury to Person Accompanying Passenger.**—A carrier must exercise ordinary care for the safety on its premises of a person going to a train to meet a friend.—*Louisville & N. R. Co. v. Smith*, Ky., 122 S. W. 806.

116. **Nuisance.**—Legislative authority for a railroad's maintenance of a roundhouse within specified limits did not justify the maintenance of a nuisance there as against adjoining house-holders.—*Terrell v. Chesapeake & O. Ry. Co.*, Va., 66 S. E. 55.

117. **Protection of Passengers.**—A passenger, while going to the depot to take passage on a train scheduled to stop there at the very

instant, may assume that a train on a parallel track will not be running in excess of the maximum speed limit, and that the carrier will not run its train over the parallel track in such a way as to subject him to unusual danger.—*Illinoian Cent. R. Co. v. Daniels*, Miss., 50 So. 721.

118. **Safety Appliance Act.**—A railroad company, which moved in the carriage of interstate commerce a car the automatic coupler on which was so out of repair that it would not work, is not relieved from liability for a violation of Safety Appliance Act by the fact that it placed a bad-order card on such car, indicating the defect.—*United States v. Chicago, R. I. & P. Ry. Co.*, U. S. D. C., N. D. Mo., 173 Fed. 634.

119. **Release—Effect of Invalidity.**—If a traction company by which plaintiff was injured furnished medical services as a consideration for plaintiff's release of damages, and the release was not binding because of plaintiff's ignorance through mental deficiency, the value of the services could be deducted from any damages recovered by her.—*McKittrick v. Greenville Traction Co.*, S. C., 66 S. E. 289.

120. **Sales—Inspection.**—Where parties to a contract of sale agree that the decision of an inspector as to quality of the goods shall be final, his decision will not have that effect if it is not the result of his honest judgment.—*Brooke v. Laurens Milling Co.*, S. C., 66 S. E. 294.

121. **States—Officers' Services.**—Time spent by a railroad commissioner in traveling to and from the place of his appointment was time spent in the service of the state, for which he was entitled to allowance.—*State v. Howard*, Vt., 74 Atl. 392.

122. **Statutes—Validity.**—The unconstitutionality of the exemption of lighting and electric railway companies and the department of police and public buildings of New Orleans from Act No. 178, p. 250, of 1908, regulating the licensing of electricians, held to vitiate the entire act.—*State v. Gantz*, La., 50 So. 524.

123. **Street Railroads—Passenger Riding on Bumper.**—One riding on the bumper of a crowded street car held to be a passenger.—*Beaumont Traction Co. v. Happ*, Tex., 122 S. W. 610.

124. **Taxation—Tax Sales.**—Where the state owning land under a sale for taxes thereafter sells it for nonpayment of subsequent taxes, it is estopped to sell the land under its title acquired by such former tax purchase.—*State v. Garnett*, W. Va., 66 S. E. 98.

125. **Torts—Joint Tort Feasors.**—One of several mine owners, each separately putting waste from his mine into a stream, held not liable as a joint tort-feasor for injury therefrom to land of another.—*Pulaski Anthracite Coal Co. v. Giboney Sand Bar Co.*, Va., 66 S. E. 73.

126. **Trespass—Damages.**—Proof of an unintentional trespass held to entitle a landowner to recover actual damages, though it was alleged that the trespass was willful and oppressive.—*Chesapeake & O. Ry. Co. v. Greaver*, Va., 66 S. E. 59.

127. **Trusts—Authority to Mortgage.**—A court of equity had original jurisdiction to authorize a trustee to mortgage the interest of life tenants, but not that of the remaindermen, to raise money to make repairs and pay the collateral inheritance tax.—*Shirkey v. Kirby*, Va., 66 S. E. 40.

128. **Vendor and Purchaser—Remedies of Vendor.**—The collection of purchase money will not be retarded because grantor has not cleared the land of prior liens, where the conveyance is with covenants of general warranty but without covenants of further assurance.—*Hart v. Larkin*, W. Va., 66 S. E. 631.

129. **Waters and Water Courses—Obstructions.**—A railroad acquiring a right-of-way crossing natural drainage did so sub modo; the condition being that it would not obstruct the drains.—*Petit Anse Coteau Drainage Dist. v. Iberia & V. R. Co.*, La., 50 So. 512.

130. **Witnesses—Competency.**—The maker of a note after the assignment thereof and assignor's death held a competent witness, in an action by the assignee against the assignor's administrator, to prove the assignment and payment to the assignor, as the assignee's agent.—*Sayre v. Woodward*, W. Va., 66 S. E. 320.

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FEDERAL INDEPENDENCE IN THE INTERPRETATION OF STATE LAW.

Justice Stephen J. Field, in the case of *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368, lamented his yielding for years, without protest, to the assertion by federal courts of their right to exercise an independent judgment respecting state law. He predicted, that such claim was an error which would yet "die amidst its worshippers."

Lawyers have seen that such judges as Miller and Campbell have revolted at extensions of *Swift v. Tyson*, but they have not heretofore seen a minority of more than one, at a time, assail the principle of federal independence of state decision. The furthest the federal supreme court has gone since Judge Story wrote the opinion in *Swift v. Tyson*, 16 Pet. 1, in the way of an unqualified statement regarding surrender of its own views, is, that it will do this as to settled decision on statute law and rules of property in the construction of the common law.

The case of *Kuhn v. Fairmont Coal Co.*, 30 Sup. Ct. 140, is unprecedented in its exhibition of as many as three members of the court dissenting from a single decision, that the federal courts are not bound by a prior decision of a state supreme court in respect to a contract right under a lease antedating such decision.

We made some comment on this case in 70 Cent. L. J. 129, but up to that time we had only read the prevailing opinion, which came to us unaccompanied by the dissent. We confess our surprise now to learn there was the latter, and the strong support it received. It is from the pen of Mr. Justice Holmes, and is concurred in by Justices White and McKenna.

We think this a somewhat memorable event in the history of the court, and we

wonder if it is the first step toward the realization of Justice Field's prediction.

This dissent is not as fierce an onslaught on the principle of independence as was that of Justice Field, but in some respects it is more significant. The vigor of language adopted by Justice Field seemed an implied acknowledgment that the doctrine was firmly intrenched. The more dispassionate utterances of Justice Holmes imply that the doctrine has reached high water mark, and a recession may be expected, if it has not already begun.

The latter justice, after showing that the attempted justification of *Swift v. Tyson* could not rest on the claim, that a federal court, like a state court, merely declared the law of a state, because the former court has so often held that state decisions "*make the law* for a state," then attacks the theory that federal courts are only bound by "settled decision." He says: "It is obviously most undesirable for the courts of the United States to appear as interjecting an occasional arbitrary exception to a rule that in every other case prevails. I never yet have heard a statement of any reason justifying the power, and I find it hard to imagine one. * * * I know of no authority in this court to say that, in general, state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years. * * * It is said that we must exercise our independent judgment, but as to what? Surely, as to the law of the states. Whence does that law issue? Certainly not from us. But it does issue, and has been recognized by this court as issuing from the state courts as well as the state legislatures. When we know what the source of the law has said that it shall be, our authority is at an end. The law of a state does not become something outside of the state court and independent of it, by being called the common law. Whatever it is called, it is the law as declared by the state judges, and nothing else. * * * It is admitted, we are bound by a settled course of decisions, irrespective of contract,

views and efforts of the advocate, who will seldom venture to throw himself openly into a conflict with the court; and other reasoning against the rule itself, are proper to submit to the legislature, but not to the bench.

One in search of something to be presented against the doctrine need not go beyond the United States Supreme Court Reports. Mr. Justice Daniel, in 1851, recorded an emphatic but futile protest against it.¹ The rule applies in either civil or criminal cases.² It is not controlled by the statute of the state forbidding judges to express any opinion upon the facts.³ Nor can a state constitutional provision affect it.⁴

With all its imperfections, trial by jury is the best method thus far devised for the judicial determination of facts, it is still a constitutional right and any encroachment upon it is justly resented. Herein lies the test of the rule under consideration, for although the judge may express himself upon the evidence, he may not trespass upon the ancient and peculiar province of the jurors. They must be left absolutely untrammeled in their own duty and must so understand themselves to be.

Sir Matthew Hale was merely voicing a self-evident truth in declaring:⁵ "If the judge's opinion must rule the verdict, the trial by jury would be useless," and Mr. Justice Harlan likewise, some two hundred years later, in saying that the functions of the court to expound the law and of the jury to apply the law "cannot be confounded or disregarded without endangering the stability of public justice, as well as the security of private and personal rights."⁶

Each case of this sort must undoubtedly be determined upon its own distinct facts, but the criterion is whether or not there is any interference with a free and independent determination by the jury. Along with

the ever qualifying essential that no proposition of law must be incorrectly stated, may be collected from the adjudicated cases the following exceptions to the rule, which are concurrent with the rule itself and narrow it more than is commonly supposed: First, The judge must not mis-state the evidence actually adduced; Second, The comments must not take the form of animated argument; Third, The comments must not be one-sided; Fourth, The law and the fact must be separated, and the jury must be left wholly free to determine the facts and all the facts.

1. The first of these is so palpably true that it can never be questioned so long as judgments depend upon evidence adduced in courts. To allow a judge to make reference to something outside the record would, of course, confer upon him the unheard of power of an unsworn and uncross-examined witness, confined only within the bounds of his own caprice. No one would urge such a proposition, nor would any court listen to it, if presented. The error, however, is sometimes fallen into, although not as frequently as the equally censured assumption by the court of facts not proved in charging upon the law.

One of the cogent arguments against permitting any comments at all is that, too often, the jury is of the belief that the judge is apprised of facts not brought forth which guide him to a juster conclusion than they can hope to reach from the strict evidence before them. Our present chief justice has carried the definition a little further, so that not only are comments and opinions upon matters not in evidence forbidden, but "deductions and theories not warranted by the evidence should be studiously avoided," as "they can hardly fail to mislead the jury and work injustice."⁷

2. That the remarks of the court ought not partake of the nature of argument is equally clear. Each party to the controversy may argue, but the judge, if he deems comments necessary, should restrict himself to a summing up of the salient features of the case without entering the realm of ad-

(1) *Mitchell v. Harmony*, 54 U. S. 115, 137.

(2) *Simmons v. U. S.*, 142 U. S. 148, 155.

(3) *Vicksburg R. R. Co. v. Putnam*, 118 U. S. 545, 553.

(4) *St. Louis Ry. v. Vickers*, 122 U. S. 360.

(5) 2 *Hal. P. C.* 313.

(6) *Sparf v. U. S.*, 156 U. S. 51, 106.

(7) *Starr v. U. S.*, 153 U. S. 614, 626.

vocacy. The judge, from intimate acquaintance and continuous experience, is deemed more capable of winnowing the evidence and thus aiding the jury to arrive at a just conclusion. "A judge," says Hook, J., in *Rudd v. U. S.*,⁸ "should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit, should see that justice is done." But, in the words of Chief Justice Fuller, in *Allison v. U. S.*,⁹ "where the charge of the trial judge takes the form of animated argument, the liability is great that the propositions of law may become interrupted by digression, and so intermingled with inferences springing from forensic ardor, that the jury are left without proper instructions; their appropriate province of dealing with the facts invaded; and errors intervene which the pursuit of a different course would have avoided." Even the most conscientious and careful of judges may sometimes overstep the line, and, of course, the effect upon the jury would not be lessened because done inadvertently. An innocent motive would not prevent the mischief. So long as the judge may express his opinion, it would seem he may, to a reasonable extent, give his reasons therefor, but there is a line between this and argument which ought not be crossed.

3. The third exception, that the remarks must not be one-sided would appear too axiomatic ever to be actually violated, and yet the United States Supreme Court had occasion to reiterate this and condemn the occurrence three times within the period of two years,¹⁰ and these were cases where men were on trial for their lives. In two of the cases just cited the reviewing court borrowed the language found in *Burke v. Maxwell*,¹¹ that "when there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression

of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be so given as not to mislead, and especially that it should not be one-sided."

It is not required that the judge sum up all the evidence, or even all bearing upon a single question,¹² although in England, from whence the practice is derived, we find in Blackstone's day the practice to be: "When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel and all others, sums up the *whole* to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence."¹³ To strike the golden mean between the freedom from mentioning all the evidence and the restriction against a one-sided dissertation, would seem, at times, enough to embarrass even the most discriminating jurist who feels called upon to make comments.

4. The requirement that the law and fact must be separated and the jury left wholly free to determine the facts, creates the greatest difficulties. Here the adage that circumstances alter cases is pertinent, if ever. The particular circumstance must always be inquired into and no precedent can be relied upon as controlling. We are told that all matters of fact must be submitted ultimately to the determination of the jury.¹⁴ If every case was as clear in principle as *Post v. U. S.*,¹⁵ the matter could be easily resolved. There Mrs. Post offered evidence in support of her defense that she could "send by emanations from her own mind such power as will, after passing through the mind of a second person, influence the physical condition of a third person." The trial court told the

(8) 173 Fed. at 914.

(9) 160 U. S. 203, 212, 217.

(10) *Starr v. U. S.* 153 U. S. 614, 626; *Hickory v. U. S.*, 160 U. S. 408, 422, and *Allison v. U. S.* 160 U. S. 203, 217.

(11) 81 Penn. St. 139, 158.

(12) *Allis v. U. S.*, 155 U. S. 117, 124.

(13) Bl. Book III.* 375.

(14) *Vicksburg R. R. Co. v. Putnam*, 118 U. S. 545, 553; *Lovejoy v. U. S.*, 128 U. S. 171, 173.

(15) 135 Fed. 1.

jury that such testimony itself is directly contrary and in opposition to the well-established laws of nature accepted by all men from the experience and study of ages and might be properly ignored without contradiction; but the upper court said the jury should not be peremptorily instructed to ignore any legal and relevant evidence which is admitted, although if such greatly taxes the credulity of the judge, or if he totally disbelieves it, he may say so, leaving the jury free to believe it or not.

A somewhat analogous instance arose in *Rudd v. U. S.*,¹⁶ where Rudd was convicted for misuse of the mails in selling, or attempting to sell, patent rights for a machine represented to operate contrary to well-known fundamental physical laws. The trial court by remarks "undoubtedly impressed upon the jury that no one with the slightest degree of intelligence above insanity could believe the machine was practicable," so that the jury might have believed that a finding for defendant would subject them to ridicule, and this was held reversible error because it left no room for the probability that the accused had been laboring under his own self-deception.

Another striking illustration of direct interference with the jury, and, although not strictly speaking a comment, yet unmistakable indication of the court's opinion, is found in *Glover v. U. S.*,¹⁷ where the court took a witness in hand and catechised him in a manner clearly to insinuate that he was untruthful. Judge Phillips says of this that "it bears on its face its own comment."

If the trial judge should say "the evidence seems to prove" certain facts, this is such an expression of opinion as will reverse the case, unless the jury is told it is not bound by such opinion.¹⁸ If the jury be told that the evidence is all on one side, it is equivalent to an explicit direction to find accordingly and fatally erroneous.¹⁹ In the case

of *Reynolds v. U. S.*,²⁰ the trial court, in a guarded manner, spoke of the evil consequences of polygamy and, upon review, it was held that this was but calling attention to the peculiar character of a crime for which the accused was on trial and reminding the jury of the duty they had to perform, and therefore permissible. Yet in a criminal case the judge should not go so far as to say that in his opinion it is the duty of the jury to convict the defendant, for this is calculated to mislead and might be taken by the jury as a direction.²¹ For, in a criminal case, even though the facts are admitted beyond dispute and the question of guilt or innocence depends wholly upon a question of law which the court must decide, yet the court cannot direct a verdict of guilty.²²

We are further told that there must be no confusion of law with facts, and it is not always apparent whether or not in a given case the jury has been given unrestrained freedom with the facts. It is not sufficient that the judge tell the jury in so many words that they are the sole judges of the fact and are not bound by his comments. The context of the charge and all the comments must be scrutinized as a whole for one part may modify or destroy another.²³ In *Burke v. Maxwell*,²⁴ from which the supreme court quotes, the judge told the jury in the clearest possible language that they were not bound at all by anything he said, that possibly he had mistaken the whole matter, and they were the exclusive judges of it, yet the reviewing court, although expressing its belief that the trial judge intended to do exact justice, said that he unwittingly overstepped the line, and that the charge, "so far from being a calm, impartial presentation of the evidence, some portions of it, at least, went far beyond the evidence," and that deductions and theories were drawn, which, if not wholly unsupported, should have been left for the jury.

(16) 173 Fed. 912.

(21) *Breese v. U. S.*, 108 Fed. 804.

(22) *U. S. v. Taylor*, 11 Fed. 470, 474; *Sparf v. U. S.*, 156 U. S. 51, 105.

(23) *Fidelity Mut. Ass'n. v. Miller*, 92 Fed. 63, 70.

(24) *Supra*.

(17) 147 Fed. 426, 429.

(18) *Anderson v. Avis*, 62 Fed. 227, 230.

(19) *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, 737.

In Hickory v. U. S.,²⁵ where it is said²⁶ the charge "violates every rule thus announced," the judge repeatedly interspersed his comments with, "You are to take into account this fact," "All these things are facts that you must take into account," "You have a right to take that fact into consideration," "And there is another fact that is so common that I have but to remind you of it because that which makes up your common knowledge you can use in the investigation of these cases," and "This concealment of the evidence of crime has been regarded by the law as a proper fact to be taken into consideration as evidence of guilt, as going to show guilt," etc. Again, for example, the trial judge in Starr v. U. S.,²⁷ in the midst of comments (vituperative, it must be admitted), said: "If it be true that you are satisfied beyond a reasonable doubt that Floyd Wilson was a man of this kind . . . your solemn duty would be to say he (Starr) is guilty." And so in the Rudd case, supra, after the extended remarks which made the jury feel it would be ridiculous to acquit, the trial court withdrew the language and said that "it does not follow that a man is a fool or insane who believes the representations" and that it was a question for the jury.

In the Pennsylvania, Hickory and Starr cases, as well as the more recent Rudd case, will be seen express recognition in the trial court's charge of the jury's province to pass upon facts, and yet the court's comments were held to have resulted in imperfect trials. There can be, therefore, such a commingling of law with fact, or overshadowing emphasis or argument upon the facts, as to overcome the positive and correct instruction to the jury of its rights and duties. Whether or not a trial judge has interfered with the independence of the jury is itself a question of fact.

HARRY B. TEDROW.

Denver, Colo.

(25) 160 U. S. 408.

(26) pp. 422-3.

(27) 153 U. S. at 627.

PARTNERSHIP—REAL ESTATE IN DESCENT AND DISTRIBUTION.

SCHLEISSLER v. GOLDSTICKER.

Supreme Court of New York, Appellate Division, First Department, December 30, 1909.

In the absence of any agreement, express or implied, between partners to the contrary, partnership real estate retains its character as real estate between the partners and between a surviving partner and the representatives of a deceased partner.

HOUGHTON, J.: After the defendants had interposed an answer to the plaintiff's complaint, they moved for judgment in their behalf under section 547 of the Code of Civil Procedure. The learned Special Term denied the motion on the ground that on a motion under the provisions of that section of the Code the insufficiency of the complaint could not be tested. As the provisions of that section have been interpreted by this court such view is erroneous. By our decisions we have said that section 547 of the Code permitted, in effect, a trial of the action upon the pleadings, and that on a motion made thereunder the sufficiency of the complaint could be tested as well as the insufficiency of a defense. Jones v. Gould, 130 App. Div. 451, 114 N. Y. Supp. 956; Milliken v. Fidelity & Deposit Co. of Maryland, 129 App. Div. 206, 113 N. Y. Supp. 809; Searle v. Halstead & Co., 130 App. Div. 693, 115 N. Y. Supp. 405; Levy v. Roosevelt, 131 App. Div. 8, 115 N. Y. Supp. 475; Crimmins v. Carlyle Realty Co., 132 App. Div. 664, 117 N. Y. Supp. 434; Ship v. Fridenberg, 132 App. Div. 782, 117 N. Y. Supp. 599. The learned Special Term in examining these decisions, of which he was aware, was of opinion that the precise point had never been raised, and as reported they do not disclose that it had been. In making our decisions, however, this court has in fact considered the question, and concluded that of necessity the complaint as well as the answer must be searched in determining whether or not a motion for judgment on the pleadings should or should not be granted.

The section permits a party to a litigation, after issue has been joined and each has al-

leged by way of complaint or defense what he deems inadvisable, to test the right of either to judgment on the pleadings by motion, without waiting for the cause to be reached upon the trial calendar, and we have held that such procedure is analogous to a motion at the opening of the trial. *Clark v. Levy*, 130 App. Div. 389, 114 N. Y. Supp. 890. The court has established a practice on such motion analogous to that upon demurrer, and in a proper case have held that a party whose pleading has been found insufficient should be permitted upon proper terms to amend.

The appellants insist that, had the sufficiency of the complaint been tested, it would have been found insufficient. We think not. The action is for the partition of real property alleged to have been purchased by a copartnership. One of the partners, through whom the plaintiff claims, died, thus terminating the partnership, and the complaint avers that all partnership debts have been paid in full except mortgages on the real estate in question. The title to at least one of the parcels described stood in the name of all three partners. The business of the partnership is not disclosed, but it does not appear that that business consisted of buying and selling real estate, and it cannot be assumed that the partnership business was of such a character. In the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty, with all the incidents of that species of property between the partners themselves and also between a surviving partner and the representatives of a deceased partner. *Darrow v. Calkins*, 154 N. Y. 503, 44 N. E. 61, 48 L. R. A. 299. 61 Am. St. Rep. 637.

Notwithstanding the express holding of the above decision, the appellants insist that the complaint falls within the later case of *Buckley v. Doig*, 188 N. Y. 238, 80 N. E. 913. In this latter case the partnership was formal for the purpose of dealing in real estate, and it was held that, the real estate being the merchandise in which the co-partnership traded, the acts of the parties showed an intention to convert the realty into personality, and that there was of necessity an implied agreement that it be so treated. For aught that appears in the present complaint, the real property

sought to be partitioned may have been purchased as an investment from the surplus earnings of the co-partnership. In such a case it would retain its character of realty and be subject to partition if the partnership obligations had been satisfied without resorting to it.

Without passing upon the question as to whether a partition action is proper where title was not vested in all of the partners, but only in one or more for the benefit of the others, the present complaint states a good cause of action, for, as above indicated, the allegation is that as to one of the parcels the title was in all three of the partners. The partnership obligations having been satisfied as to this parcel, at least the heir or devisee of the deceased partner could maintain an action in partition.

It follows, therefore, that the learned Special Term, although the reason which he gave was untenable, properly refused to grant judgment in favor of the defendants dismissing plaintiff's complaint.

The order should, therefore, be affirmed, with \$10 costs and disbursements. All concur.

NOTE—*The English and American Rule as to Partnership Assets in Land.*—The case of *Darrow v. Calkins*, supra, discusses very thoroughly the English rule to the effect that not only is real estate to be regarded as personal property by the partners *inter se*, but it continues so for every other purpose in a property sense, or at least so far as any interest therein is concerned. Of course, we speak only as to parties and privies and those who are concerned with respect to a partnership. This case thus speaks of the English rule: "The English rule, after many fluctuations, has, as we understand the cases, come to be, that lands purchased by a partnership with partnership funds, whether purchased for or used for partnership purposes or not, provided only they were intended by the partners to constitute a part of the partnership property, become *ipso facto*, in the view of a court of equity, converted into personality for all purposes—as well for the adjustment of the partnership debts and the claims of the partners *inter se*, as for the purpose of determining the succession as between the personal representatives of a deceased partner and an heir-at-law. *Darby v. Darby*, 3 Drew. 495; *Essex v. Essex*, 20 Beav. 442; *Lindley, Partn.* 3d Ed., 681 et seq." The opinion, further on, says: "The general doctrine of 'out and out' conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are as-

sets for the payment of all debts and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest seems hardly sufficient to justify a fiction which would deprive real estate of a partnership of its descendible quality when it is admitted on all hands that real estate, if the necessity arises, is first subject to be appropriated in equity to the discharge of all partnership obligations and the adjustment of the equities between the parties."

The American theory of a qualified conversion into personality, i. e., placing real estate of a partnership on the footing of personality to subject it to partnership obligations and to equities between the partners, extends to a disregard of the form of the legal title, that is whether it runs to a firm or one or more members thereof. *Shanks v. Klein*, 104 U. S. 18.

The American doctrine, also, has been held to mean, that this subjecting all assets alike to the necessities of the partnership may prevent their character as realty or personality being determined as of the date of the death of one of the partners. Thus in *Coolidge v. Burke*, 69 Ark. 237, 62 S. W. 253, the facts show, that a firm owned a mortgage, which was declared by the court as being but a security for debt to be a chose in action and therefore personality. One partner dying, the other held the assets as trustee for the sole purpose of winding up the partnership business. "As such, it was his right as well as his duty, to gather in and make available all the assets of the firm for satisfying firm creditors, adjusting partnership equities, and then hold the residue for distribution to those entitled thereto." Then the court declaring that everything for these purposes was personality, also said: "The surviving partner had the unlimited power and right, so long as he acted in good faith, to change the form of assets from personality to realty and the reverse. That is, he had the right of conversion." Administering these assets this chose in action was converted into land. "Before the affairs of the partnership were concluded, that which was personality by rightful process of conversion had become partnership realty, and it so remained until the time for distribution."

This chose in action having been thus converted was disposed of, in distribution, as realty. The logic of this holding was lately applied by the Arkansas court in the case of *French v. Vanatta*, 104 S. W. 141, in holding that the heirs of a deceased partner, were not necessary parties in an application by surviving partners to sell partnership property, as "there is no individual property until partnership property is at an end, which does not occur until its debts are paid, its affairs are closed and the residue of assets distributed."

In Kentucky the English doctrine has been ruled to obtain. See *Cornwall v. Cornwall*, 69 Ky. (6 Bush) 369, and *Bank of Louisville v. Hall*, 71 Ky. (8 Bush) l. c. 678, in reaffirmance. The former case cites all the English authority and then observes: "There is much conflicting dictum and some contrariety of judicial determination among American courts, and it may still be said, as in a note to section 94, p. 164, of the 6th Edition of Story on Partnership, by Gray, issued in 1868, that on the whole the

law does not seem to have advanced much beyond its condition when the author declared it open to many distressing doubts." The court then concludes that the safe and reliable rule is for an "out and out" conversion. The Vermont rule seems in accord with this case. *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54.

But a great majority of the states are against the English rule and seem to differ only, as to when the character shall be determined. In Georgia a surviving partner cannot convey title to land. *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679. The rule would seem to be the same in Tennessee, or at least the title in realty vests in the heir at the decease of the ancestor, but any rents accruing while the surviving partner holds possession for partnership purposes are personal property, and if it is necessary to sell the realty the surplus vests in the heir. *Griffey v. Northcut*, 52 Tenn. (5 Heisk) 746.

Many cases go on the theory expressed in the *Coolidge case supra*. See *Wilcox v. Wilcox*, 95 Mass. (13 Allen) 252; *Campbell v. Campbell*, 30 N. J. Eq. (3 Stew.) 415; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Appeal of Leaf*, 105 Pa. 505.

While the English courts may have evolved this personality theory, because of primogeniture and entail, yet there might be advanced something in the way of reasoning for its application here, because of our dower statutes giving rights of dower in realty of which the husband was seized during coverture, but American decision does not apparently concede this. See *Dickey v. Shirk*, 128 Ind. 278; *Woodward-Holmes Co. v. Mudd*, 58 Minn. 236, 49 Am. St. Rep. 503. Her claim is likewise one that is subject to claims of creditors and equities of the other partners, and, presumptively, to the surviving partner's right of conversion according to the necessities of a partnership's affairs. See *Hunnicutt v. Summey*, 63 Ga. 586; *Blossom v. Van Aminge*, 63 N. C. 65. Dower, then, may be said to be but an incident in the way of an exception to the general policy of our law as stated in the *Darrow case supra*.

An exception to real estate in partnership being such has been made in the case of a partnership dealing in real estate as its stock in trade. Thus, in New Jersey it was held that what we have said was the American rule did not apply "where the only business is the dealing in real estate and the original contract contemplated and required its sale during and at the end of the partnership business. *Patrick v. Patrick* (N. J. Ch.), 63 Atl. 848. And such seems the case in 188 N. Y., referred to in the principal case, but the decision there was careful to confine itself to the facts saying: "We agree that a conversion should not be adjudged as between the heirs and personal representatives except upon evidence clearly warranting such a determination and that it would be unsafe and unsatisfactory to base such a determination upon a mere oral agreement made many years ago." Then the court finds a distinct purpose on the part of the partners that the realty should be deemed personality. We think, even that is a doubtful rule. If realty is realty there ought to be something more than intention to make it personality. It is enough under the American rule to distribute property in the form it stands when the partnership is wound up. That is a rule with certainty about it.

ENGLISH AND CANADIAN DIGEST.

REPORT OF RECENT IMPORTANT ENGLISH AND CANADIAN CASES FOR THE WEEK.

Principal and Surety—Liability of Surety After Release of Principal Debtor.—A surety is not discharged by the release of the principal debtor if he has expressly bound himself by the instrument creating the suretyship to continue liable.

The plaintiff mortgaged certain properties to the defendant bank to secure all moneys for the time being due on the overdraft of Perry Bros., a firm consisting of his two sons. The mortgages were in the usual banker's form, containing a clause that the bank should be at liberty without thereby affecting their rights under the mortgage "to determine or vary any credit to the debtors or any of them, to vary, exchange, or release any other securities held or to be held by the bank for or on account of the moneys hereby secured or any part thereof, to renew bills or promissory notes in any manner, and to compound with, give time for payment of, and accept compositions from and make any arrangement with the debtors or any of them." Perry Bros. got into financial difficulties, and, there being several bankruptcy petitions pending against them, they called a meeting of their creditors, at which a scheme was accepted that a company should be formed to take over all the properties owned by Perry Bros., and issue to the creditors in satisfaction of their debts debenture stock to the amount of their debts plus .25 per cent. *Perry v. National Provincial Bank of England, C. of A., Jan., 1910.*

Cozens-Hardy, M. R., said that the case was a curious one. It arose out of the law of principal and surety, and it was important to distinguish clearly between the rights under an ordinary contract of suretyship not containing special provisions and the rights of a surety when the instrument creating the suretyship contained special clauses. In what might be called the simple case, a surety was discharged if, for example, a creditor gave time to his principal debtor, and a fortiori if a creditor released his principal debtor the surety was released too. There were many other acts which might release the surety if there was no reservation of rights against him, but if in the instrument of suretyship there was a provision that the surety should continue liable notwithstanding the doing of any act, all these doctrines had no application at all.

ENGLISH NOTES.

"It can hardly be said that the majority of Englishmen are wholly satisfied with the administration of the law of libel in this country. The verdicts of juries appear sometimes to be irrational, and the boundaries of the law relating to privileged communications and fair comment have not been ascertained with precision. Things, however, are much worse on the other side of the Atlantic. Judge Gaynor, the Mayor-elect of New York, took occasion, the other day, at a dinner given in his honor by lawyers of different counties forming the state, to complain of the low estate to which the law of libel had sunk of late years, and said that it would depend upon him whether it remained

so or not. He hoped that the publication of private letters which was now going on would not continue under his administration. The law of libel in New York was the same as the law in England, but in New York there was no enforcement of the law. A statute had long been in force in the state which made it a crime to publish any letter or private paper of another person without his consent, but this enactment was wholly disregarded with no interference on the part of the public prosecutor. His own house had been entered in the night-time; his desk and papers ransacked, and a garbled copy of a letter received by him was published in one of the newspapers. Judge Gaynor's observations are explained by the conditions affecting the newspaper press of the United States. A craze for great circulation, no matter among what classes, as the only evidence of success and the only way to make the sale of the newspaper a source of profit, is widely prevalent. American papers have always been more strongly personal than English journals. Many of them give their views and opinions without restraint, and the libel laws are apparently resorted to less by people who have character to protect than by those who are tempted to make an inadvertent error the foundation of an action. It is rumored, however, that some change may be expected in the character of the American newspaper press." *Solicitor's Journal, Vol. LIV, p. 75.*

A quaint case came before Mr. Justice Eve on the present sittings (*Re Charlesworth*). The Rev. E. G. Charlesworth, for very many years a member of the Cleveland Clerical Society, in the diocese of Durham, the members of which meet quarterly at 11 a. m. to discuss the religious welfare of the district, who had seen that the expense of providing themselves with a mid-day meal away from their homes after these quarterly meetings prevented clergymen living in the remoter parts of the district from attending the meetings, bequeathed a sum of stock to the society, upon trust to apply the dividends in paying the costs of this meal, instead of the clergymen paying such cost out of their own pockets; and the question arose whether, notwithstanding that the society was a charity, the destination of the income was really charitable, so as to avoid falling within the rule against perpetuities. It was argued in favor of the bequest that it was equivalent to a gift to the society on condition that they altered their arrangements in such manner as to give the mid-day meal free so far as the dividends would extend; that a perpetuity within the limits of a charity was not illegal; and that the effect of the gift was to increase the benefits conferred upon the community by the society by ensuring a larger attendance of the clergy. On the other hand, it was contended that this would be illegal as a bribe to the clergy to attend; that the bequest was not in substance a gift to the society but a trust for a purpose outside its objects; and that providing meals was not a charitable bequest, as there was nothing to confine the benefits to the poorer clergy. Mr. Justice Eve, after remarking incidentally that the inducement to attend created by the bequest was perfectly justifiable, having regard to the natural craving for food at the time the meetings ended, said that the gift promoted the objects of the society, and that the attendance of the wealthier clergy to give their experience and advice might be just as useful as that of their poorer brethren, and decided that the gift was a good gift for a charitable religious ob-

ject. All we can add, in the way of legal authority for this decision, is that Lord Stowell's dictum (reported in Boswell's Johnson), that "a dinner lubricates business," may be equally applicable to the prospect of a dinner.—The Solicitor's Journal, Jan. 15, 1910.

JETSAM AND FLOTSAM.

DAMAGES NOT RECOVERABLE FOR INNOCENT INFRINGEMENT OF TRADE MARK.

We have quite recently called attention to decisions of courts in England and Scotland holding that a defendant may be liable for damages for wholly unintentional libel (*Jones v. Hulton & Co.*, L. R., 1909, 2 K. B. 444; affirmed by the House of Lords); *Reeves v. Weekly News*, see Law Journal, London, December 8, 1909, New York Law Journal, June 11, 1909, January 14, 1910). We expressed disapproval of the doctrine of these decisions, and are glad to see that in a recent English case involving innocent infringement of trade mark the court adhered to a rule which is more consonant with justice and common sense. The substance of such determination is set forth in the following extract from the *Solicitors' Journal* and *Weekly Reporter* of January 22, 1910:

"The case of *Slazenger v. Spalding* (27 R. P. C. 20) is an interesting and important one. The plaintiffs were entitled to two registered trade marks for golf balls. The defendant sold some golf balls which were marked with what was admittedly an infringement of the plaintiff's trade mark, but they did so in ignorance of plaintiff's rights. On the plaintiffs objecting the defendants offered to consent to a perpetual injunction and to pay the proper costs and also to pay 10 pounds sterling in respect of damages (if any); but the plaintiffs refused this offer and brought their action to trial, claiming that they were entitled to either an inquiry as to damages or an account of profits. The defendants relied upon Lord Westbury's judgment in *Edleston v. Edleston* in 1863 (1 De G. F. & J., 185), where he said: Although it is well founded in reason and also by decision that if A has acquired property in a trade mark, which is afterward adopted and used by B in ignorance of A's right, A is entitled to an injunction, yet he is not entitled to any account of profits or compensation, except in respect of any user by B after he became aware of the prior ownership; and also upon a similar decision in 1880 of Jessel, M.R., in *Ellen v. Slack* (24 *Solicitors' Journal*, 290). In the former case the trade mark was, of course, not registered; in the latter case it was. While not questioning the defendant's good faith, the plaintiffs contended that notice of their trade marks was immaterial, but if it was, the register of trade marks was notice, as it was open to public inspection. Neville, J., before whom the action was tried, said that the question was whether the principle of *Edleston v. Edleston* applied since the passing of the Trade Mark Act, 1905. He held that it did, and that where the infringement of a trade mark is made without knowledge of the existence of the plaintiffs' trade marks, there is not a right to compensation, but only to an injunction. He held that

the defendant did not know of the plaintiffs' rights, and that the trade marks' register was not notice to all the world. The plaintiffs, therefore, being wrong in proceeding with their action after the defendants' offer, he only awarded them an injunction, with costs up to the date of their refusal of the offer, and any costs that would be necessarily incurred to obtain an order; the other costs in the action they were ordered to pay. But the learned judge, although holding that the plaintiffs were not entitled to compensation, expressed an opinion that the defendants ought not to withdraw their offer of 10 pounds sterling. The defendants did not claim the right to withdraw this offer—as they clearly might have done—so it was held that the plaintiffs were entitled to the 10 pounds sterling. The principle of the decision—that the plaintiffs were not under the circumstances legally entitled to compensation—appears to us to be right, but the learned judge apparently thought that they were morally entitled to it."

The tendency of American authority would seem to be to support the position taken in the English case. In *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, occurs the following dictum.

"If the plaintiff has the absolute right to the use of a particular word or words as a trade mark, then, if an infringement is shown, the wrongful or fraudulent intent is presumed, and although allowed to be rebutted in exemption of damages the further violation of the right of property will nevertheless be restrained."—New York Law Journal.

LOOSE LEAF LAW REPORTS.

The mode of using law reports will be completely revolutionized if the system suggested by Mr. P. T. Carden in the current number of the Law Quarterly Review should be adopted. Briefly, it consists of the abolition of binding for law reports, the printing of each case on separate sheets, and the filing and indexing of the cases so that the report of any particular case can be picked up without difficulty.

Thus there would be no change in the actual reports, or in the pages, except so far as necessary to secure that each case began and ended separately from its neighbors. But the cases, instead of being in bound volumes, would be arranged in drawers of suitable size, and the suggestion is that the arrangement should be in alphabetical order according to the name of the case. Mr. Carden anticipates the question. "What will be gained by unbinding the leaves of the reports and rearranging the order of the cases?" His answer is "Space, time, money and temper." Space is to be gained because the lawyer will refuse to keep a large number of the cases which now fill the bound reports; and at any rate, he will carry into court only the actual cases he intends to cite. The first point is perhaps deceptive. A collection of leading cases is useful enough for the student. To the practicing lawyer it is of doubtful utility, and—even if the publishing difficulties could be got over—it would be a difficult task to make a full collection of useful cases, and to reject others. But for carrying cases into court the system is undoubtedly attractive. A few loose reports would take the place of the many volumes which are required for arguing a difficult case. The system, however, does not stop at the mere unbinding of the reports and the rearrangement of the cases in alphabetical order. In order to use them some machinery for ready

reference is necessary, and Mr. Carden proposes to furnish this by means of index cards. The card, of which he gives a specimen, would contain the case-name—printed on an extension of the card—a short statement of the case, and references to cognate authorities, and would be placed with the case in the drawer so that the name would be visible. But this still leaves it necessary that the lawyer should know the name of the case he wants, and the system requires to be completed by apparatus of the nature of ordinary digests. The details of the scheme must be sought in Mr. Carden's paper.

The Solicitor's Journal (London), in commenting on this suggestion, says: "We are not averse to improvements or to the change which improvements necessitate. If loose leaf law libraries are convenient, doubtless they will come, and instead of pleasing rows of bookshelves we shall look on piles of drawers, suggestive of drugs or deceased butterflies, but really filled with careful selections of judicial wisdom. We have a vision, though, of the lawyer at the end of a busy day of reference, gazing in despair at the debris that the day's work has left in the shape of loose leaves, and we doubt whether they would ever get back to their proper places."

CORRESPONDENCE.

DAMAGES AS COSTS ON APPEAL IN FAVOR OF SUCCESSFUL RESPONDENTS.

Editor Central Law Journal:

I have a client who has a claim against one of the larger railroad companies of this state. There can be no doubt of the justice and reasonableness of the claim, both in law and fact, but the amount involved is so small, that it is not worth paying a heavy attorney's fee. The railroad company has refused to pay the matter, and I am confronted with the question as to what to advise my client. If I advise him to bring suit in the local justice court, the railroad is almost certain to appeal the case to a higher court, and not unlikely to carry the matter to the court of the last resort of the state. To carry it up there will involve upon my client the duty of employing an attorney to represent him, whose reasonable fee would certainly be more than the amount involved, in the event the attorney should charge a fee that is at all proportionate to the labor involved. In all events, my client is likely to wait some time before he receives the money due him.

This condition is by no means unusual, for almost any attorney can relate similar incidents, but it illustrates a condition that I think can be removed by the following remedy:

There should be a statute passed along the following lines, that in the event a party appealed from the judgment of a justice of the peace, and was unsuccessful in the higher court, he should pay as part of the fixed costs of the suit, ten per cent of the amount involved, to be collected as other costs, this should apply to both plaintiff and defendant, and there should be a like rule regarding appeals from courts of record to appellate courts.

It seems to me that such a rule as the above, would tend to discourage frivolous and speculative, as well as vindictive lawsuits, it would

have a tendency to discourage those parties who wish to cause the opponent as much trouble as possible, and perhaps discourage the large corporations who have the habit I have mentioned.

It seems to me that the only exception to the rule that would be justified would be, in the case of unliquidated damages, in all other cases if the plaintiff has a just cause which is properly presented to the court, he is entitled to judgment, and should be allowed to secure compensation from the defendant who has caused him to undergo all the annoyance, delay and expense of a lawsuit, instead of compensating him for the injury suffered without the aid of the courts. On the other hand, in the event the plaintiff does not have a just claim, or does not present the matter to the court in the proper manner, he should compensate the defendant whom he has brought into court, and caused to suffer all of the delay, annoyance and expense incident to defending a lawsuit.

The question of the reformation of our courts is one that is being seriously considered by the laity and bar, and I suggest that the course I have indicated will have a beneficial effect.

ROBERT W. GODBEY.

Apache, Okla.

[Note.—The suggestion of our correspondent is not an unwise one. In some features the suggestion has been adopted in other states. Thus North Carolina, Florida and Georgia, have laws that impose a forfeit of fifty or sixty dollars on railroad corporations which unsuccessfully resist certain small claims.

In Arkansas a law has been passed that collection by assignee of any damage claims not exceeding ten dollars might be made from the railroad agent at destination and on refusal, treble damages may be recovered.

These enactments contain a very important suggestion in solving the question of the accumulation of cases on appeal and the multiplication of reports.

Very many cases would not be appealed and go to swell that vast volume of decisions on well settled points of law if the appellants were mulcted heavily in costs if their appeals failed.

We would suggest a minimum extra charge on all appellants of ten dollars to be added to the costs to be paid to the respondent for attorney fees and other expenses and trouble to which he is put by the appeal. In addition, when the amount of the judgment, or in the case of an appeal by the plaintiff the amount asked in the petition exceeds the sum of one hundred dollars the costs on appeal for benefit of the respondent should be ten per cent of such amount, provided that in no case should the sum so recovered exceed one hundred dollars.

Such a law would certainly discourage frivolous appeals. Where a plaintiff or defendant had a good case he would appeal, but where he was only appealing for the sake of delay, he would think seriously before incurring this additional expense.

It has been suggested that such a law should apply only to appeals by defendants, first, because a plaintiff seldom brings a case without sufficiently feeling that there is some merit in it; second, because the burden of all the initial costs of the proceeding are already upon him; and third, because the plaintiff's appeal seldom embarrasses a defendant.

However, we are not committed to any particular suggestion along these lines, but would

be glad to hear from members of the profession in respect to this suggestion.

Editor.]

FOREIGN CORPORATIONS DOING LOCAL BUSINESS.

Editor Central Law Journal:

We notice that the Supreme Court of the United States has lately decided some important questions growing out of litigation started in the State of Kansas involving the filing of the Articles of Incorporation. The first one decided a few days ago was in favor of the Western Union Telegraph Company and we now notice that the Pullman Palace Car Company has won a favorable decision on the same questions. We hope that you will give the opinion in your valuable journal rendered in the first case, as the questions decided there are attracting considerable attention in some of our northwestern states.

Very truly,
C. W. JOHNSTON.

Des Moines, Ia.

[Note.—We take it that our correspondent refers to the case we discuss in 70 Cent. L. J. 109. Publication of this case in the Supreme Court Reporter will likely appear almost coincidentally with the appearance of this number. Mr. Justice Holmes, in his dissent says: "If after this decision the State of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there or from doing local business until it has paid \$20,100, I shall be curious to see upon what ground that legislation will be assailed." We think he need not be curious about what Justice White would say on this. All the others would probably say the requirement is enforceable, unless they were persuaded that the exaction is not required in good faith to subserve the interests, welfare and convenience of the people of Kansas. We suppose that the judges, holding the majority view would be very loath to brand the statute of a state in this way. But, if a state should say, naming certain corporations, that this one should pay \$20,000, another \$15,000, another \$10,000, etc., etc., and it could be fairly concluded that the State was merely endeavoring to "whip the devil around the stump" of the supreme court's decision, the performance would bear resemblance to a farce, and, possibly, be so adjudged.—Editor].

BOOK REVIEWS.

MURDOCH'S BUILDING A LAW BUSINESS.

A very odd and yet quite a serviceable booklet appears under the title, "Building a Law Business," by George H. Murdoch. It is a book of suggestions mainly for the commercial lawyer, and treats of various forms of legal advertising. It is a book of ways and means for the ingenious lawyer to rake in the shekels in various legitimate ways. The subject is discussed in six chapters. Chapter I., Introductory; Chap. II., Methods of Advertising in Commercial Use; Chap. III., Law Writing and Compiling; Chap. IV., Organizing a Clientele; Chap. V., Social and Political Activity; Chap. VI., Conduct of Business. The suggestions are all good, although some of the advertising features would hardly be favored by practitioners of the old school. Nevertheless, the young, struggling lawyer often is compelled to smother a little

pride in order to get a footing. Later, when business comes easy, he can afford to repent of his early escapades and uphold more strictly the "honor of the profession."

Printed in one small volume of 76 pages and published by the Murdoch Law Book Co., East Orange, N. J.

HUMOR OF THE LAW.

The following answer was recently filed in the State of Washington by a defendant who expressly refused to have anything to do with lawyers:

To Exhibit A.

In the Superior Court of Washington for

C_____ County.

(Ans. to the Summons.)

—, Mc_____. Plaintiff.

vs.

C. W._____. B_____, Defendant.

For Collection of one Promissory Note given Nov. 11, 1907 A. D. \$150.

Due April 15, 1908, Cr. May 20, 1908, \$50.
Secured by Chattels, filed November 16th.

Answers:

The execution should not be allowed prior to Sep. 1908 for the following reasons viz: That said J. R. Mc_____ on or about April 13, 1908 mutually agreed to allow note to run till Sep. 1908 at interest from April 15.

II. That said J. R. Mc_____ did not demand payment prior to this action.

III. That the defendant voluntary made payment of one other promissory note of 40\$ secured by chattels.

IV. That the defendant also has made cash payments to the amt. of 50\$ which were voluntary and have been Cr. on the Note which shows to corroborate that there were an extension of time for payment.

V. That said J. R. Mc_____ and wife have money insavings & deposits therefore are not in need; while the defendant is in stringent financial condition with his sister and her family to support and is at wage working while crops are developing having grown crops on the Mc_____ P_____ farm that is rented from J. R. Mc_____ & other assurance given and excepted for rent.

VI. That this action was brought because of spite or grievance caused between house keepers Mrs C_____. O_____. & Mrs. J. R. M_____. My sister demanding our Share of and the needed house room That said J. R. Mc_____ has made stringent efforts to compell, or influence the Defendant C. W. B_____ to grant said Mc_____ to freely occupy the premises.

VII. That the defendant offered voluntarily a Bill of sale of the chattel securing the notes incumber prior to any action.

Signed C. Wesley Brown

I, C. W. B_____, have personally written the foregoing instrument as answering the summons why execution should be delayed or not allowed by this complaint.

C. W. B_____, Wash.

Subscribed and sworn to before me this 26th June 1908.

(Signed)

County Clerk.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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3.—Conditions.—A debtor paying by check containing a condition held authorized to withdraw the condition prior to the acceptance of the check by certification.—*Drewry-Hughes Co. v. Davis, N. C.*, 66 S. E. 139.

4.—Payment by Check.—The retention of a check which was shown by a letter and voucher which accompanied it to be in full payment of the account sued on, without any explanation, held a payment in full of the account.—*Goodloe v. Empson Packing Co., Mo.*, 122 S. W. 771.

5. Action—Splitting Cause of Action.—Each of the wards of a guardian held entitled to maintain a separate action against the guardian's administrators for the recovery of a separate share of the estate, though they had designated themselves as joint claimants in filing their claims with the administrators.—*Miller v. Ash, Cal.*, 105 Pac. 600.

6. Animals—Stock Law.—The penalty prescribed by the stock law of May 23, 1901. (Acts 1901, p. 305), for its violation, is not applicable to stock merely running at large.—*Rowe v. State, Ark.*, 122 S. W. 626.

7. Appeal and Error—Affirmance.—Where the court affirms a judgment on condition of remittitur of an excess in amount, and judgment has been executed, on failure to restore the excess,

the entire judgment will be reversed.—*Duval v. Advance Thresher Co., Neb.*, 123 N. W. 1022.

8.—Restraining Order.—A temporary injunction having been dissolved, and a justice of the Supreme Court, after appeal, having ordered a stay pending appeal, the clerk of the district court must observe the order, though no supersedeas bond was given.—*Staples v. Hobbs, Iowa*, 123 N. W. 935.

9. Arbitration and Award—Submission.—Under Code, sec. 4386, the name of the court in which judgment may be entered, the demands to be submitted, the names of the arbitrators, and the time within which the award must be made may be modified by subsequent stipulation, and all other matters may be changed or omitted in writing or by parol.—*Wilkinson v. Pritchard, Iowa*, 123 N. W. 964.

10. Assignments—Validity.—In a cause of action for personal injury surviving the claimant's death, an assignment by him of an interest therein is valid.—*Wells v. Edwards Hotel & City Ry Co., Miss.*, 50 So. 628.

11. Attachment—Claims by Third Persons.—That a constable received a void indemnifying bond executed after service of claim to the attached property by a third person would not waive his right to demand service of a sufficient statutory notice of claim.—*McFarlane v. Dick, Iowa*, 123 N. W. 1005.

12. Bankruptcy—Corporation Subject to Aid.—The conducting by a corporation of a shop for the repairing of automobiles, which repairing consisted chiefly in the adjusting of parts purchased from other persons, was not a manufacturing pursuit, which subjected the corporation to proceedings in bankruptcy.—*Cate v. Connell, U. S. C. C. of App., First Circuit*, 173 Fed. 445.

13. Bills and Notes—Insertion of Date.—A bona-fide holder without notice of a note held entitled to enforce it notwithstanding the fact that the payee inserted an improper date there-in.—*Bank of Houston v. Day, Mo.*, 122 S. W. 756.

14.—Sufficiency of Evidence.—In an action on a note shown to have its inception in fraud by an alleged holder in due course, the burden is upon plaintiff to affirmatively establish his good faith in the transaction.—*Arndt v. Aylesworth, Iowa*, 123 N. W. 1000.

15. Boundaries—Proceedings to Establish.—On appeal from a county surveyor's report establishing boundary lines, record of former survey held admissible, though not showing that it was made on notice to all interested parties.—*Dent v. Simpson, Kan.*, 105 Pac. 542.

16. Brokers—Duty to Disclose Facts.—Broker sending customer to his principal to negotiate directly, without communicating to the principal his knowledge that the customer was resolved to pay the price asked, held to forfeit any right to commission.—*Carter v. Owens, Fla.*, 50 So. 641.

17. Carriers of Freight—Persons who May Sue.—The owner of crates of pears intrusted as a commissionman with other crates, such crates together making up a car, can sue for any damage thereto.—*Atlantic Coast Line R. Co. v. Partridge, Fla.*, 50 So. 634.

18. Carriers of Passengers—Injury to Passengers.—A passenger cannot recover for mental suffering incident to an injury in the absence of a showing of wanton or willful disregard of his rights.—*Caldwell v. Northern Pac. Ry. Co., Wash.*, 105 Pac. 625.

19.—Wrong Date of Ticket.—A passenger presenting a ticket with an erroneous date cannot enhance his damages by resisting the conductor's order to leave the train, nor because of force used in ejecting him.—*Arnold v. Atchison, T. & S. F. Ry. Co.*, Kan., 105 Pac. 541.

20. Common Law—Adoption.—Under the statute of 1883 the common law remains in force in the state only so far as not modified by constitutional and statutory law, judicial decisions, and the conditions and wants of the people.—*Cooper v. Seavers*, Kan., 105 Pac. 509.

21. Constitutional Law—Governmental Powers.—The creation of reclamation districts held solely within the discretion of the Legislature, which can neither be compelled, enjoined, or controlled.—*Inglan v. Hoppin*, Cal., 105 Pac. 582.

22.—State Regulation of Railroads.—Kirby's Dig., secs. 6634, 6636, imposing different penalties on railroad companies and their agents for failure to provide waiting rooms with wholesome drinking water, was not unconstitutional as depriving railroad companies of the equal protection of the laws.—*State v. St. Louis & S. F. R. Co.*, Ark., 122 S. W. 627.

23. Contracts—Additional Stipulations.—That additional stipulations styled a "rider attached to and forming a part of" the contract referred to by its date form a part of the contract is conclusively shown by the rider itself, and it is as much subject to the provisions of the contract as any other part.—*Barton v. Travelers' Ins. Co.*, S. C., 66 S. E. 118.

24.—Consideration.—Where a widow repudiated a contract to permit defendants to use certain land so long as they should support her, defendants, having had the use of the land prior to the repudiation, could not claim the value of their services.—*Glass v. Hampton*, Ky., 122 S. W. 803.

25.—Destruction of Subject Matter.—A contract calling for the rendition of personal service by one is subject to the implied condition that, in the event of his death, further performance on both sides will be excused.—*Levy v. Caledonian Ins. Co.*, Cal., 105 Pac. 598.

26.—Time of Payment.—Contract for court-house made in August, with due provision for payment thereunder, held not rendered illegal because the work was not required to be completed and final payment made prior to April 1st of the following year.—*Pilcher v. English*, Ga., 66 S. E. 163.

27.—Validity.—A contract for the sale of pianos for resale to the public by the buyer under a word contest held not invalid as contrary to public policy.—*D. H. Baldwin & Co. v. Moser*, Iowa, 123 N. W. 988.

28.—Validity.—A contract between the Governor and the beneficiary under an appropriation bill, by which the Governor approved and signed the bill on the beneficiary agreeing to accept a less amount in full satisfaction, is void as against public policy.—*Lukens v. Nye*, Cal., 105 Pac. 593.

29. Corporations—Appointment of Receiver.—Upon an application for appointment of receiver of a foreign corporation, where its title to the property is attacked, held error to refuse to consider its answer on the ground that it had failed to comply with the foreign corporation law.—*Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, Idaho, 105 Pac. 569.

30.—Liability of Corporate Officers.—Officers of corporations are not individually liable to the

corporation creditors because the capital stock was not fully subscribed, unless made so by the express terms of the statute under which it was organized.—*American Radiator Co. v. Kinney*, Wash., 105 Pac. 630.

31.—Officers.—The failure of a secretary of a corporation to properly keep the minutes held not ground for appointing a receiver, especially in the absence of any suggestion of loss having resulted therefrom.—*Semple v. Frisco Land Co.*, La., 50 So. 619.

32.—Receivers.—The receiver of a corporation appointed to preserve its property pending litigation is not authorized to pay debts which accrued before his appointment, and outstanding contracts of the corporation cannot be enforced against the receiver unless he adopts them.—*Fountain v. Stickney*, Iowa, 123 N. W. 947.

33.—Ultra Vires Acts.—If a sale of a minor's land to a corporation upon petition by the guardian was otherwise valid, and the minors have received the consideration of the sale, they cannot assert want of power in the corporation to take and hold the land as a ground for vacating the sale.—*Ancell v. Southern Illinois & M. Bridge Co.*, Mo., 122 S. W. 709.

34. Criminal Law—Failure of Accused to Testify.—Under Code Cr. Proc. 1896, art. 770, held, that it was reversible error to ask defendant whether he testified on a former trial.—*Brown v. State*, Tex., 122 S. W. 565.

35.—Opinion Evidence.—One may be qualified by study without practice, or by practice without study, to give an opinion on a medical question.—*Copeland v. State*, Fla., 50 So. 621.

40. Criminal Trial—Discharge of Jury.—The discharge of the jury in a capital case for illness of the judge held a discharge from necessity, so that accused was not placed in jeopardy.—*State v. Vernado*, La., 50 So. 661.

41.—Former Jeopardy.—In a criminal case, held that jeopardy did not attach under Const. art. 1, sec. 18, where the jury was discharged under Pen. Code, sec. 1140.—*People v. Disperati*, Cal., 105 Pac. 617.

42.—Improper Argument.—Remarks of the district Attorney, in the prosecution of a negro for shooting a white man with intent to kill, held appeals to race prejudice, and reversible error.—*Harris v. State*, Miss., 50 So. 626.

43.—Misconduct of Jury.—Jurors speak through their verdict, and cannot violate secrets of the jury room and tell of partiality or misconduct that transpired there, nor speak of methods which induced to produce the verdict.—*State v. Linn*, Mo., 122 S. W. 679.

44.—Petition for New Trial.—That members of a traverse jury which convicted defendant asked the court to grant a new trial was no ground therefor.—*Corbitt v. State*, Ga., 66 S. E. 152.

45.—Witnesses.—Where accused was a witness in his own behalf, the court erred in charging that in general a witness who is interested will not be as honest, candid and fair as one who is not.—*Holmes v. State*, Neb., 123 N. W. 1043.

46. Crops—Contracts.—Party furnishing seed wheat for a fourth of the crop held to have a right thereto superior to a mortgage given by the other party on the entire crop.—*Dodson v. Covey*, Kan., 105 Pac. 519.

47. Damages—Warning Against Sympathy.—In an action for personal injuries to plaintiff,

and for the death of his wife and three children from an explosion of illuminating oil, held that the jury should have been cautioned not to allow questions of sympathy or sentiment to enter into their deliberations.—*Chapman v. Pfarr*, Iowa, 123 N. W. 992.

48. **Death—Separate Actions.**—On the wrongful death of a person, two causes of action arise—one for the benefit of the estate and the other for the next of kin.—*Murphy v. St. Louis, I. M. & S. R. Co.*, Ark., 122 S. W. 636.

49. **Descent and Distribution—Death of Ward.**—On the death of a ward, an action against the guardian for an accounting must be brought by the ward's legal representatives and not by his heirs.—*Miller v. Ash*, Cal., 105 Pac. 600.

50. **Dismissal and Nonsuit—Voluntary Non-suit.**—A contention that plaintiff should have been allowed to take a nonsuit is without merit, where he had ample time to do so before final judgment against him, but made no request therefor.—*Offenstein v. Gehner*, Mo., 122 S. W. 715.

51. **Dower—Assignment.**—Where a contract giving an option to purchase realty was assigned before acceptance, it was not necessary that the purchaser's wife should join therein.—*Fletcher v. Painter*, Kan., 105 Pac. 500.

52. **Specific Property.**—A widow's dower is to be carved out of the specific property of which her husband was possessed, and not out of the proceeds of its sale.—*Johnson v. Johnson*, Ark., 122 S. W. 656.

53. **Easements—Ways of Necessity.**—Where there was no outlet to the public highway from land sold, the law implied a grant of a reasonable right of way from the remainder of the vendor's land to the vendee, and subsequent grantees of the vendor took subject to such right of way.—*Roland v. O'Neal*, Ky., 122 S. W. 827.

54. **Eminent Domain—Homestead Right of Minors.**—The homestead right of a minor in land can be taken by eminent domain.—*Ancell v. Southern Illinois & Mo. Bridge Co.*, Mo., 122 S. W. 709.

55. **Power to Take Property.**—Though a corporation is organized to engage in private business in addition to its purpose to construct and operate railroads, it may exercise the power of eminent domain.—*State v. Superior Court*, Wash., 105 Pac. 637.

56. **Proceedings to Widen Street.**—If a public easement already exists in land to be taken to widen a street, no damages should be allowed for its present exercise, but, to so reduce a claim, the easement must have arisen in some recognized manner, and be established by proper testimony.—*City of New Bern v. Wadsworth*, N. C., 66 S. E. 144.

57. **Equity—Laches.**—A party possessed of information of extraneous facts and circumstances sufficient to put him, as a prudent person, on inquiry, is charged with constructive notice of all that he might have learned by an inquiry prosecuted with diligence as affecting a plea of laches.—*Miller v. Ash*, Cal., 105 Pac. 600.

58. **Mistake.**—“Ignorantia juris non excusat” has no application where under a mutual mistake one party purchases from another property which he already owns.—*Houston v. Northern Pac. Ry. Co.*, Minn., 123 N. W. 922.

59. **Estoppel—Acquiescence.**—A grantee who had accepted a draft as full payment for land conveyed to him by one whose title was de-

fective by reason of a prior recorded but not properly acknowledged deed held not entitled to repudiate the payment, and to reassert his claim to the land.—*Abernathy v. Pickett*, Tex., 122 S. W. 579.

60. **Matters Precluded.**—Where a partner holding title to land treated it during his lifetime as partnership property his heirs would be estopped from claiming title thereto through him.—*Johnson v. Hogan*, Mich., 123 N. W. 891.

61. **Execution—Purchase by Judgment Creditor.**—Where land is bought at execution sale by the judgment creditor, held, that he is presumed not to have paid cash, but to have credited his bid on the judgment.—*Lightfoot v. Horst*, Tex., 122 S. W. 606.

62. **Executors and Administrators—Assets.**—An undivided interest in a paid-up policy on the life of another held to be an asset of the beneficiary's estate after insured's death, and payment by insurer, although the beneficiary died before insured.—*In re Ulrich's Estate*, Mo., 122 S. W. 761.

63. **Exchange—Property in Seat.**—An assignee of a seat in a stock exchange in an assignment to secure a debt due from the owner held not entitled to sue the exchange, or its president for the debt.—*Shannon v. Cheney*, Cal., 105 Pac. 588.

64. **Executors and Administrators—Sale of Real Estate.**—A deed by one of the three executors on whom had been conferred the power to sell, could not be upheld because the other two took no active part in administration.—*Weeks v. Hosch Lumber Co.*, Ga., 66 S. E. 168.

65. **Explosives—Negligent Sale.**—Whether a seller of Coca-Cola bottled by him was negligent, and hence liable for an explosion of a bottle, held for the jury.—*Dall v. Taylor*, N. C., 66 S. E. 135.

66. **False Pretenses—Statutory Provisions.**—Rev. St. 1899, sec. 2213 (Ann. St. 1906, p. 1410), held directed against obtaining money or property from one whose confidence has first been secured by fraudulent representations in connection with acts done with intent to defraud, and to be intended to reach offenders known as “confidence men.”—*State v. Wilson*, Mo., 122 S. W. 701.

67. **Fixtures—Intent in Making Annexation.**—In ascertaining the intention to make machinery or other articles permanently a part of a factory building, adaptability to the work or business is important, and if necessary thereto, or to the purpose for which the building was designed and used, or a convenient accessory, or commonly employed, intention to annex permanently may be inferred.—*Banner Iron Works v. Aetna Iron Works*, Mo., 122 S. W. 762.

68. **Forgery—Elements of Offense.**—Under Code Cr. Proc. 1895, art. 225, held, that one passing a forged check in Texas may be prosecuted there, even if the forgery were committed beyond the state, where the bank on which it was purported to be drawn is situated.—*Batte v. State*, Tex., 122 S. W. 561.

69. **Frauds, Statute of—Pleading.**—Acceptance and receipt of chattels satisfying the statute of frauds will not be invalidated by a subsequent return which the seller does not consent to as a rescission.—*McMillan v. Heaps*, Neb., 123 N. W. 1041.

70. **Receipt of Chattels.**—Acceptance and receipt of chattels satisfying the statute of frauds will not be invalidated by a subsequent return which the seller does not consent to as a rescission.—*McMillan v. Heaps*, Neb., 123 N. W. 1041.

71. **Gifts—Construction.**—Donation of lot to town for establishment of public held properly revoked for nonperformance of obligations imposed on donee.—*Violche v. Town of Marks*, La., 50 So. 662.

72. **Guardian and Ward—Custody of Ward's Estate.**—The court may by a general order authorize a guardian to invest his ward's money in land to be selected in his discretion.—*In re Wishner's Estate*, Iowa, 123 N. W. 978.

73. **Setting Aside Sale of Ward's Land.**—A sale of a ward's land will not be declared invalid because the appraisers could not remem-

ber years afterward, upon testifying in proceedings to set aside the sale, of having appraised the land.—*Ancell v. Southern Illinois & M. Bridge Co., Mo.*, 122 S. W. 709.

74. **Homicide—Intent.**—If accused placed a child to which his sister-in-law had just given birth in an exposed position near his house, without any intent to kill it, but to hide his sister-in-law's shame and his own paternity of it until it could be carried away, he would not be guilty of assault to murder, but of some lesser degree. If of anything.—*Martin v. State, Tex.*, 122 S. W. 558.

75. **Husband and Wife—Community Debt.**—The payment of a note representing a community debt may be enforced after the wife's death in a proceeding via executive against the surviving husband, without making the wife's heirs parties.—*Schlieder v. Boulet, La.*, 50 So. 617.

76. **Liability for Tort of Child.**—Husband held liable for injuries to a person from a pistol shot inflicted by his wife's 12-year-old son, where the husband lived with the wife, if the wife was liable therefor, under *Revelation 1908*, sec. 2105.—*Brittingham v. Stadlem, N. C.*, 66 S. E. 128.

77. **Improvements—Repudiation of Contract.**—On repudiation of a life tenant's contract to give defendants the use of property for support, defendants held entitled to a lien for the increase of the vendible value of the property because of permanent improvements.—*Glass v. Hampton, Ky.*, 122 S. W. 803.

78. **Indemnity—Implied Contract.**—An indemnitor given reasonable notice to appear and defend against a city's liability for injuries by an obstruction in a street, held bound by a judgment against the city as to all matters necessary to establish the city's liability.—*City of Grand Forks v. Pauliness, N. D.*, 123 N. W. 878.

79. **Insolvency—Jurisdiction.**—The court in which insolvency proceedings are pending has original jurisdiction of an action on the bond given by the debtor for the release of the property.—*Interstate Trust & Banking Co. v. United States Fidelity & Guaranty Co., La.*, 50 So. 612.

80. **Intoxicating Liquors—Enjoined from Selling.**—One who was enjoined from selling intoxicating liquor or keeping with intent to sell the same in violation of law held guilty of violating the injunction.—*Goodrich v. Wheeler, Iowa*, 123 N. W. 950.

81. **Local Option—Ky. St. 1900, sec. 255.**—held not liable for sale in prohibited local option territory of nonintoxicating malt liquor.—*City of Bowling Green v. McMullen, Ky.*, 122 S. W. 823.

82. **Manufacture.**—The manufacture of intoxicating liquor in July, 1909, held in violation of law.—*Johnson v. State, Ga.*, 66 S. E. 148.

83. **Revocation of License.**—A conviction of permitting gambling in a barroom, in violation of Act No. 176, p. 242, of 1909, § 10, had at the same time as a conviction of selling liquor to a minor in violation of section 6, held a second conviction of violation of the act, within section 8, warranting a revocation of defendant's license.—*State v. Apfel, La.*, 50 So. 613.

84. **Judges—Recusation.**—A judge, recusing himself and appointing a judge ad hoc, retains jurisdiction to review the appointment, on suggestion that the judge ad hoc is disqualified.—*State v. Woods, La.*, 50 So. 671.

85. **Judgment—Collateral Attack.**—A personal judgment in favor of the assignee of a note secured by mortgage pending a suit to foreclose the mortgage for a personal judgment rendered by a court having jurisdiction of the subject-matter and of the parties held not void, though erroneous.—*Staples v. Shiver, Ky.*, 122 S. W. 826.

86. **Res Judicata.**—Where A sold timber to B and C, and a judgment decreed B the owner of the timber, it was res judicata against A, purchasing the timber from C.—*Roach v. Craig, La.*, 50 So. 652.

87. **Judicial Sales—Setting Aside.**—Great inadequacy of price, accompanied by slight circumstances indicating unfairness, held sufficient to justify the setting aside of a judicial sale.—*Roger v. Whitham, Wash.*, 105 Pac. 628.

88. **Replevin—Justices of the Peace.**—Where

both parties to replevin before a justice fixed the value of the property at an amount within the justice's jurisdiction, a jury on appeal to the circuit court could not properly find the value at a sum greater than the highest amount alleged.—*People's Sec. Bank of Worthing v. Sanderson, S. D.*, 123 N. W. 873.

89. **Landlord and Tenant—Repairs to Building.**—Tenant held entitled to recover cost of repairs to building caused by breaking of plate glass window by burglars.—*Weil v. Bonart, La.*, 50 So. 655.

90. **Tenancy From Month to Month.**—A tenant from month to month held not entitled to possession and to recover damages for an eviction after termination of his lease by default in rent.—*Wilson v. Moore, Tex.*, 122 S. W. 577.

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92. **Life Insurance—Vested Interest.**—One having an undivided interest in a paid-up policy on the life of another held to possess a vested interest.—*In re Ulrich's Estate, Mo.*, 122 S. W. 761.

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94. **Mandamus—Acts Subject to Review.**—The superior court held authorized on mandamus to compel the board of supervisors of a county to establish a reclamation district, where the undisputed facts prove all the matters required by Pol. Code, sec. 3446 et seq.—*Inglin v. Hoppin, Cal.*, 105 Pac. 582.

95. **Adequate Other Remedy.**—The more adequate and speedy remedy which a suitor must possess to defeat his right to mandamus is a legal, rather than a physical, remedy.—*State v. Holmes, N. D.*, 123 N. W. 884.

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97. **Injuries to Servant.**—An employer held not liable for injuries to a workman struck by a hammer flying off the handle.—*Dunn v. Southern Ry. Co., N. C.*, 66 S. E. 134.

98. **Method of Work.**—While it was the duty of a switch crew to know on what track they were moving an engine and car at night, they might transfer the car from one part of the yards to another on any track they might select if it was safe for that purpose.—*Yeager v. Chicago, R. I. & P. Ry. Co., Iowa*, 123 N. W. 974.

99. **Negligence.**—The general rule against the recovery for injuries sustained by persons while attempting to get on or off a moving train held not to apply with absolute strictness to "train hands," brakemen, and the like.—*Reeves v. North Carolina R. Co., N. C.*, 66 S. E. 133.

100. **Protection of Employees—Acts 28th Leg. p. 178, c 112, sec. 1, approved April 3, 1903.**—requiring electric railways to provide appliances to protect motormen from the weather, held valid as a police regulation if otherwise valid.—*Beaumont Traction Co. v. State, Tex.*, 122 S. W. 615.

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112. **Parent and Child.**—**Liability for Torts of Child.**—Relationship alone does not make a parent answerable for the wrongful acts of his minor child; but it must appear that he approved such acts, or that the child was his servant or agent.—*Brittingham v. Stadiem, N. C.*, 66 S. E. 128.

113. **Partnership.**—**What Constitutes.**—Partners whose business it is to buy and sell cotton seed are a trading partnership.—*Cotton Plant Oil Co. v. Buckeye Cotton Oil Co., Ark.*, 122 S. W. 658.

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115. **Perjury.**—**What Constitutes.**—A false statement as to the property owned, made by one justifying as cognizor in a criminal prosecution, is perjury, and not false swearing.—*Warren v. State, Tex.*, 122 S. W. 541.

116. **Pleading.**—**Verification.**—In the absence of a statute authorizing such procedure, a party may not interrogate a third person verifying the pleading of the adverse party as to the sufficiency of his knowledge of the facts alleged in the pleading.—*D. H. Baldwin & Co. v. Moser, Iowa*, 123 N. W. 989.

117. **Principal and Agent.**—**Personal Injuries.**—In general when a person acts avowedly as an agent for another who is known as the principal, his acts and contracts within the scope of his authority are considered the acts and

contracts of the principal, and involve no personal liability.—*Roach v. Rutter, Mont.*, 105 Pac. 555.

118.—**Right to Purchase.**—Agents to lease and collect rents held to have committed no fraud in the purchase of the property of their principal, and not required to account for profits made on a resale thereof.—*Douglass v. Lougee, Iowa*, 123 N. W. 967.

119. **Property.**—**Ownership.**—Where property has been obtained from the owner by a felonious act, his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it.—*Russell v. Brooks, Ark.*, 122 S. W. 649.

120. **Public Land.**—**Homestead.**—Under Rev. St. U. S. sec. 2291 (U. S. Comp. St. 1901, p. 1390), a homestead entryman, on making final proof, must file an affidavit that he has not directly or indirectly alienated, or agreed to alienate, said land.—*Harris v. McCrary, Idaho*, 105 Pac. 558.

121. **Railroads.**—**Duty to Stop and Listen.**—One having a right to cross a railroad track need not stop to look or listen before crossing, in order to discover whether a train is approaching.—*Chesapeake & O. Ry. Co. v. Patrick, Ky.*, 122 S. W. 820.

122. **Religious Societies.**—**General Council.**—Action of a council, not shown to have authority, in excommunicating a pastor of a local church, held not ground for enjoining the pastor and his followers among his congregation from using the church property.—*Mason v. Lee, Miss.*, 50 So. 625.

123. **Sales.**—**Executed Contract.**—Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not shown.—*American Jobbing Ass'n. v. Wesson, Ark.*, 122 S. W. 664.

124. **Schools and School Districts.**—**Levying Taxes.**—Taxpaying citizens of a city school district may sue to restrain the school board from levying taxes to pay interest on illegal school district bonds.—*Martin v. Bennett, Mo.*, 122 S. W. 779.

125. **Specific Performance.**—**Method of Performance.**—A vendor will not be allowed to agree upon a method of performance, induce the purchaser to act accordingly, and then work a gross fraud by repudiating altogether.—*Fletcher v. Painter, Kan.*, 105 Pac. 500.

126. **Taxation.**—**Assessment of Property.**—When property is not assessed for more than its true value, but is assessed much higher than other property, the remedy of the owner is to ask that the assessment be equalized by raising the assessment of all property to its actual value, and not by lowering the value of his own.—*George C. Bagley Elevator Co. v. Butler, S. D.*, 123 N. W. 866.

127. **Vendor and Purchaser.**—**Bona Fide Purchaser.**—One asserting a title resulting from the reservation of an express lien on land for the purchase price as against a grantee of the purchaser has the burden of proving that the purchaser had notice of an express lien.—*Buckley v. Runge, Tex.*, 122 S. W. 596.

128.—**Bona Fide Purchaser.**—The word "trustee," following the name of a grantee in a deed, is notice sufficient to put those dealing with him concerning the property on inquiry as to the trust.—*Snyder v. Collier, Neb.*, 123 N. W. 1023.

129. **Water and Water Courses.**—**Percolating Waters.**—The English rule as to property rights in percolating underground waters does not obtain in New Jersey; the landowner in New Jersey being entitled only to the reasonable use thereof.—*Meeker v. City of East Orange, N. J.*, 74 Atl. 379.

130. **Wills.**—**Contests.**—Proof that testator was insane, and had been insane for a long period of years, held to create a presumption that he was insane at the time of the execution of the will, and the burden of establishing a lucid interval was on the party asserting it.—*Buford v. Gruber, Mo.*, 122 S. W. 717.

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THE HUMANITARIAN DOCTRINE AS RESPECTS EMPLOYEES.

The humanitarian doctrine in contributory negligence cases means, that, where one is seen to be in a position of peril, the one, who sees him, must, if he has the means at hand to do so, warn him of the danger he appears to be unmindful of rather than run upon him, though this peril results from the exposed person's own negligence. This principle has long been recognized in Missouri. By a very recent decision, however, the Supreme Court of that state has held that the application of this doctrine is different as between employees and strangers. *Degonia v. Railroad*, 123 S. W. 807.

We submit that, if our readers will pause at this place and ask themselves what direction this difference, if there is any, takes, they would at least, be divided in opinion as to whether the doctrine was to be more favorably applied in behalf of employees than strangers. The Missouri court decided, that there was a difference and it operated against employees.

In the *Degonia* case an employee, knowing that an express train was due to pass a certain station within a short time, began shovelling cinders from the track. While his back was turned in the direction from which the train was approaching and he was apparently oblivious of danger, he was run upon by the train, going at rapid speed, he being in clear view of the engineer. The employee was shouted at by one of his companions, but apparently did not hear, and no engine whistle gave a warning blast.

The court conceded that such a state of facts would have carried the case to the jury had the intestate of plaintiff not been the company's employee, having knowledge of the expected arrival of the train, and it formulated the general principle, that the doctrine of which we speak was to be ap-

plied less strictly in behalf of employees than others.

Before taking issue with the court as to the correctness of such a principle, we desire to say, that we not only find more of its prior decision against its latest ruling than the opinion concedes, but we also fail to find the remotest suggestion of any such principle in any one of the cases it cites or any other Missouri case we have examined. In many cases the reasoning is upon the line of there being no such distinction.

Thus, take *Brockschmidt v. Railroad*, 205 Mo. 435, in which the opinion was written by Fox, J., who announces his full concurrence in the *Degonia* case, independently of all question whether he now stands opposed to former view of the court or not. Judge Gantt, who concurred with Judge Fox, in the *Brockschmidt* case, in the *Degonia* case merely agrees to the result. The *Brockschmidt* case was not that of an employee of defendant, but the opinion in the *Degonia* case appears to assume it was. Judge Fox, however, compared an employee with the injured party as to knowledge of the situation, relying on *Clancy v. Railroad*, 192 Mo. 615, an employee case, which ruled, for other reasons, that the humanitarian doctrine was not involved. *Evans v. Railroad*, 178 Mo. l. c. 512, an employee case, was also relied on by him and there it was distinctly said: "Those in charge of trains have a right to presume in the first place that such persons (employees) will keep out of danger, and not until they have good reason to believe they will not do so and then fail to use all proper means at their command to prevent injuring them," should defendant be held liable.

If the *Brockschmidt* case is not upon every fair construction against the *Degonia* case, these Missouri judges might do well to stop writing their inordinately long opinions and content themselves with a brief announcement of their conclusions.

The case of *Cahill v. Railroad*, also found in 205 Mo., at page 205, relied on by the prevailing opinion in the *Degonia* case, is merely irrelevant on this question. It

holds, and cites very respectable authority to show, that in the conduct of its business a railroad may assume that employees are observant of their surroundings, and warning signals do not have to be given, as when an engine is running in places where strangers, less acquainted with what is going on, might be exposed to sudden dangers.

The cases above referred to, except the Degonia case, were decided in Division and it is, of course, the duty of the court *en banc* to correct error in division. But as the Degonia opinion refers to division cases as supporting authority, we challenge its references.

However, we have a prior unanimous decision of this court, *en banc* which we think wholly inconsistent with the Degonia case. Sharp v. Railroad, 161 Mo. 214. That case speaks as did the Evans case. Thus it says, in effect, that it was shown not to be customary to sound the whistle for section men *unless they seemed to be unmindful of an approaching train*. Because, in the Sharp case, the whistle was sounded when the train was distant a few lengths of the cars, the engineer was considered to have done all that was required and for this reason alone the railroad was absolved from liability.

The Sharp case, therefore, laid down the rule recognized in the Evans case; the latter was approved in the Brockschmidt case, and yet the Brockschmidt case is relied on to support the Degonia case.

Having said this much to show how the Missouri court has turned away from its record, and has not hesitated thus to do by a bare majority, it might be asked, what overruling necessity, as opposed to desirable uniformity in precedent, confronted this majority? The principle might be considered harsh if incorrect, but its declaration, even if right, suggests no special urgency therefor.

But we dispute its correctness as a principle, and believe that one man's life seen to be in peril ought to be cared for as well

as another's. We see no mercy or justice in any law, that will seek out distinctions of this kind. A human being is about to be slain by a locomotive or a street car, unless the engineer or motorman, having the means at hand, gives him timely warning. Shall it be said his negligence in being exposed is of no moment, if he is a stranger, but the killing is excusable if he sustains a contractual relation to the railroad or street railway? Would the engineer hesitate to pull the throttle, or the motorman to ring his gong or turn off his current, on any such consideration, or would it be expected by anybody, that he would?

More than this, however, we assert, that, if any distinction is to be found in such matters of life and death, it should be rather expected in cases of employees than of strangers, and we think there is authority for this view.

In Comstock v. Railroad, 56 Kan. 428, it was said, in effect, that an employee, being at his post of duty, is entitled to receive warning, and we believe abundant cases on the same line can be found. It is but an application of the rule, that a master is reasonably bound to give the servant a safe place to work. Also, if a servant's post of duty is, where danger may arise, he is nevertheless bound to give requisite attention to the work he is sent to perform and he is not expected to keep a constant lookout for danger. Railroad v. Kane, 70 Ill. App. 676.

In the case of St. Louis I. M. & S. R. Co. v. Jackson, 93 S. W. 746, 6 L. R. A. (N. S.) 646, the Arkansas Supreme Court approved an instruction as follows: "If plaintiff's intestate was absorbed in the performance of the duties of his employment and was thus oblivious to danger and did not see and did not hear the train approaching him; and if a man of ordinary prudence and care for his own safety, situated as plaintiff's intestate was, would have been so absorbed and oblivious of his surroundings and would not have seen and would not have heard the train approaching, then plaintiff's intestate was not guilty

of contributory negligence which would bar a recovery in this case."

That instruction says nothing about discovered peril, but would it not have seemed absurd to distinguish the humanitarian against him, because he had gone there knowing that a train would soon arrive?

Every employee on a track may be fairly supposed to be there in the interest of his railroad, while such is not so as to a stranger or trespasser. Shall a railroad be justified in running upon one who is oblivious because he is working for it, and not when obliviousness arises from one who is absorbed for other reasons?

We may further say the Sharp case furnishes an excellent, if there is any, reason for a distinction in favor of, rather than against employees. It is there said, in effect, to be customary to warn employees apparently unmindful of danger. Assuming that employees are acquainted with such custom, is it not far less reckless for an employee to expose himself to peril than for one unacquainted with such custom?

Therefore, it is not an answer to say the employee is more negligent than the other, because he knew better. The real point is whether it is not fully as, if not more, careless for an engineer or motorman to run upon one presumably at his post of duty than upon one who appears to be where he has no business to be?

We came across a case in Georgia, to-wit, the case of Rawlston v. Railroad, 94 Ga. 536, holding merely that certain facts showed no cause of action. These facts were that a section man was ordered to go to a certain point as quickly as possible and repair the track before an expected train could arrive, his boss telling him he would look out for the train. The man worked rapidly and excitedly in such emergency. He heard the train coming and waved his hat, in full sight of the engineer, for him to stop. The train was far enough away for this to be done. The section man continued his work driving a spike that saved the train from being ditched, just as he was run upon and killed.

This holding was universally condemned as being wholly indefensible. But the tendency of the Missouri ruling is precisely to this result.

What benefit such a ruling can be to any public policy it is hard to imagine. But it well may be thought, that, if railroads are to be favored thus against their employees, the safety of those who travel on trains may be lessened, rather than secured.

On general principles, however, to say there can be any distinction between one person and another, when life can be saved merely by a warning, seems unreasonable and to put an employee below a stranger, in this regard, absurd.

The court by such ruling says prior negligence is suicide in one case, and mere inadvertence in the other. In the former case it presumptively arises from engrossment in duty—in the latter it could have no such excuse.

NOTES OF IMPORTANT DECISIONS.

AUTOMOBILES—LOOK AND LISTEN DOCTRINE IN REFERENCE TO STREET CROSSING BY PEDESTRIANS.—The New York Supreme Court, in Appellate Division, has held that it is not contributory negligence as a matter of law for one not to look in both directions as he steps from the sidewalk to cross a street, because vehicles must keep on their proper side. *Brantley v. Jaeckel*, 119 N. Y. Supp. 107. The injury to the pedestrian was by an automobile proceeding at a rapid speed on the wrong side of the street. The rule as to looking both ways is distinguished from the case of one going on a railroad track, though one would not have to look but one way, it would seem, if the railroad was double-tracked. The court said: "It is no hardship upon owners of automobiles, which are traveling silently and without any signal of warning, as in this case, and on the wrong side of the street and close to the curb, to hold that the person in control of the car must be observant not only of what is directly in front of it, but of pedestrians who are traveling on the sidewalk and who may step into the street in front of the car."

The automobile "honk" seems as much in judicial cognizance as the engine bell or the street car gong, and the public have the right for one to sound as much as the other.

The plane upon which the three are, as dangerous machines, seems about the same, with rigidity of rule rather against the automobile. We know where a train or a street car has to be, and the New York court says we know where the automobile ought to be, and we can assume the existence of one fact as well as the other. One of the court dissented.

DOMICILE—CHANGING DOMICILE UNDER TREATY RIGHTS.—A very interesting question on the question of change of domicile recently came before the Supreme Judicial Court of Maine. *Matthew v. Cunningham*, 74 Atl. 809. A former resident of Maine resided at Shanghai, China, at the time of his death. He was there as an American citizen, and under the jurisdiction of United States law, by virtue of a treaty between this country and China. In effect, he came under American law by permission of the Emperor of China.

The court says: "It would appear that the only reason assigned for withholding from the decedent the right of Chinese domicile is that, while he lived on Chinese soil, under Chinese sovereignty, he was subject to laws extended to the particular territory by treaty instead of by edict. We are able to discover neither logic nor reason for the distinction here suggested. The fundamental idea of domicile does not depend upon any distinction with respect to the source of the local law. A Chinese domicile gives the decedent's estate a fixed place of abode, and subjects it to the law governing the locality, whether American law or Chinese law, it is nevertheless the law of the place, as to American citizens."

The question which appears to us is whether or not, if one goes to a place where he is under treaty rights, instead of to a place to which law is extended by edict, if the *animus manendi* is to be reasonably inferred. A treaty may be abrogated or modified between the high contracting parties whenever they agree, whatsoever its terms as to duration. Or it may contain on its face provisions, contingent in their nature, which would bring it to a sudden close. Private rights cannot operate to prevent the contracting parties from abrogating or changing.

Therefore, the *animus manendi* might have a presumed qualification to it which would make it ineffectual to substitute for the old a new domicile. With edict the assumption must be that its effectiveness will continue as fully as in the place removed from.

The Maine court says the leading authority on this issue is the English case in *re Tootsal's Trusts*, decided in 1883, in which it was held that there was no new acquisition of domicile. It was said that under the treaty between

Great Britain and China (same in effect as between United States and China), "no domicile can be acquired in an Anglo-Oriental community," and this was on the ground, as stated by Judge Chitty, that: "There is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign power."

An arrangement of this sort appears to us more to resemble a "modus vivendi" than a permanent statute, and the fact that it is of probable long duration would not seem to help the matter from the standpoint of principle.

It rather looks to us that the English view is better grounded than the Maine.

The English case being decided in 1883, there might seem an inference that the treaty with our country would have provided otherwise, if the rule was so to be. But we do not by this intimate that China has any interest in the question, but at least it was a matter our treaty could have been explicit about.

COMMON LANDS—CHARITABLE TRUST ARISING OUT OF AN ANCIENT GRANT.—The case of *Stead, Att'y Gen., v. President, etc., of Commons of Kaskaskia*, 90 N. E. 654, Supreme Court of Illinois, carries us back to the times of Joliet, Marquette and La Salle, and invests its reading with something of the flavor of old romance.

The court, however, was looking for an authentic basis on which to predicate a legal conclusion. And this conclusion was to be directed to an evil which unhappily was far less romantic than real. The parish of the Immaculate Conception of Kaskaskia was given a grant about two hundred years ago, confirmed by a patent in 1743. There was a settlement there known as Our Lady of the Kaskaskias. The patent described the boundaries. This patent was recognized, not specifically, but generally, with other rights in the cession to Great Britain, and when in 1778 George R. Clark made conquest of the northwest territory this was for Virginia, which commonwealth made cession to the United States in 1784. There was a provision in the grant for revenue from the commons to be devoted to educational and religious purposes. Illinois law sought to make this provision effectual and provided for the election of trustees to manage the commons. Sale being forbidden, leases were made for as long periods as fifty years. Fraud crept into the management and bogus bids were made, so that the trustees might resort to private bids. Thus the charitable interest furnished opportunity for graft, and the entire management became honeycombed with

fraud. Fraudulent leases for long periods at nominal prices were made, and the whole affair smelled so rank to heaven, that finally the attorney general of Illinois brought proceedings to oust the trustees, recover moneys appropriated and misappropriated, and to cancel leases. One of the points relied on was that the inhabitants of the parish, and not simply of the village, should have elected the trustees. It seems a strange thing that this question waited so long and the court is, just now for the first time, holding that the parish inhabitants were the proper electors.

We refer to this case, not so much for any particular question of law involved, as to point to the fact that abuses with respect to some 15,000 acres of very valuable land could have continued so long before being called to book. These lands were distributed by a liberal hand in a vast domain, when leagues of land concerned less than feet in this day and time.

But what a wonderful heritage was left to that parish, and how has a charitable purpose been made the opportunity for fraud to go on in its unchallenged career. That beneficent purpose has spread more contagion in evil and undermined morality more deeply and lastingly, than if Joliet, Marquette and La Salle had merely been possessed of a buccaneer spirit, or they had been exploiting America as Lord Clive did the Indies. It seems a sacrilege that a missionary sacrifice has been converted into such a scandal.

CONDEMNATION PROCEEDINGS FOR MINING PURPOSES.

The right of a mining company to take private property for purposes connected with its business by the exercise of eminent domain, is one that is not yet definitely settled. It is important to note that during recent years there has been a gradual change in the law on this subject, in the direction of permitting persons engaged in the development of mines to avail themselves of this right.

Originally condemnation proceedings could not be had unless the right inured to the public; that is, unless the public had a legal right to use the utility for which the land involved was to be condemned. As illustrating this position we quote from Mr. Mills: "The use to which property is condemned must be public. As between in-

dividuals, no necessity, however great, no exigency however imminent, no improvement however valuable, no refusal however unneighborly, no obstinacy however unreasonable, no offers of compensation however extravagant, can compel or require a man to part with one inch of his estate."¹ The point of contention accordingly is whether the development of mines is a public use justifying the exercise of this power. No definition has been or can be constructed which will settle the question as to what constitutes a public use within the meaning of this subject of the law. As one court said, "Doubtless this arises from the fact that the courts have recognized that the definition of 'public use' must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society."²

California is one of the few Western states holding squarely that the development of mines is not a public business in the sense that property may be taken by eminent domain for their development. Most of the other states have decided otherwise, but usually the right of the public to use the utility constructed was conceded, so that the question as to whether the mining business was of itself of sufficient benefit to the community to permit of condemnation proceedings where the public did not have that right, was not decided.

During recent years, however, a few states have met this last question squarely and decided in favor of the mining companies. As we shall see, this position has been recently approved by the Supreme Court of the United States, so that we may expect most of the states eventually to follow that precedent.

The older view is well illustrated by the decision in an early Illinois case.³ A certain coal company attempted to condemn a strip of land for the purpose of constructing a tramway extending from its mine to a railroad. The Supreme Court of that state

(1) *Mills on Eminent Domain*, Sec. 23.

(2) *Tanner v. Treasury Co.*, 83 Pac. 464.

(3) *Sholl v. German Coal Co.*, 118 Ill. 427, 59 Am. Rep. 379.

refused to permit the condemnation, holding that the use for which it was proposed that the land should be condemned was not a public one. "The coal, the coalworks and the present tramway are in the strictest sense private property, and the public generally have no more interest in them or in the operation of the works, including the tramway, than they have in any other strictly private business. * * * Without the consent of the owners of it (the tramway), there is not a person in the state, outside of themselves, who would have the right to ride upon it on any terms that might be proposed, or to have carried upon it a single pound of freight." It will be observed that the court does not consider the public benefit that might accrue by reason of the development of the mine, but only the right of the public to use the tramway.

California early passed a law authorizing the exercise of the right of eminent domain to condemn lands for tunnels, flumes, ditches, dumps, etc., for working mines, and declaring them to be public uses. In a case brought up to the Supreme Court in 1876 it was held that the statute was unconstitutional and void.⁴ Said the court: "It is clear from the averments of the complaint that the object sought, is the appropriation of the private property of the defendants to the private use of the plaintiff. It is a private enterprise to be conducted solely for the personal profit of the plaintiff, and in which the community at large have no concern. It is clear that this case does not come within the meaning of that clause of the constitution which permits the taking of private property for a public use after just compensation is made." The plaintiff contended that the statute was a legislative declaration that the construction of ditches and dumping places constituted a public use, and that the judgment of the legislature was conclusive. But the court refused to follow this doctrine, though conceding that the general rule was as contended by the plaintiff, holding that the case came within

the exception that "where there was no foundation for a pretense that the public was to be benefited thereby, in such case it would be our duty to interfere and afford relief."

Another western state following the California doctrine is Colorado. It has been held in that state that a tramway to a privately-owned mining claim was clearly a private affair, and that hence property could not be condemned for uses connected therewith. But the Supreme Court of that state seems to be veering about somewhat, judging from a recent decision. In that case the Treasury Tunnel Mining Company, desired to condemn a right of way for tunnel purposes through the Corn Cob lode. It is important to note, however, that it further appeared that the intention of the plaintiff company was to furnish drainage to mines adjacent to its line. The Supreme Court affirmed a decision of the lower court giving it that right. Said the court: "For the development of the great mining industries of this state tunnels of the character contemplated by petitioner are not only expedient but necessary. The necessity of the vesting of corporations of the character of petitioner with the right to exercise the power of eminent domain is apparent; for without this power enterprises of the character contemplated by the petitioner could be thwarted and the development of the mining resources of the state prevented by those owning property crossing the line of a projected tunnel. * * * The use and benefit of the tunnel will be in common and may be enjoyed by all whose properties are so located with reference thereto that they may avail themselves, if they so desire, of the opportunities thus afforded for the development of their properties."⁵ It will be noticed that the court does not say that the right would have been granted had the public not had the right to use the tunnel. But the importance attributed to the mining industry may indicate an extension of the rule in case the question comes fairly before the court.

(4) Channel Co. v. Cent. Pac. R. Co., 51 Cal. 269.

(5) Tanner v. Treasury Co., 83 Pac. 464.

In 1903 the Northport Smelting Company, a Washington corporation, filed a petition to condemn certain lands for the purpose of conducting water across the land to its smelter. Certain other questions were involved, but on the point under discussion here the Supreme Court said: "The question as to whether a corporation has a right to condemn land for the purpose of aiding in operating a smelter, on the theory that the operation of the smelter is for a public use, has been decided adversely to the contention of the respondent in *Healy Lumber Co. v. Morris*.⁽⁶⁾ In the case referred to, which involved the right to condemn a right of way for logging purposes, the court said: "It must be conceded that there are quite a number of decisions to the effect that the phrase 'public use' should be construed to be synonymous with public benefit, and that when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state or through any of its agencies. * * * It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. * * * Under such liberal construction the brewer could demand successfully the condemnation of his neighbor's land for the purpose of the erection of a brewery, because forsooth, many citizens of the state are profitably engaged in the cultivation of hops. Condemnation would be in order for gristmills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. The principle is the same in one case as in the other; the difference is only in degree." But as Justice Holmes has said, most differences are only differences of degree. Washington will undoubtedly be obliged eventually to concede the

right of eminent domain in certain cases where the public is vitally interested in the prosperity of a certain industry. The difference between the interest of the public in the brewery business referred to and the railroad business is only one of degree, but is such in the latter case that railroads are universally conceded the right to condemn lands essential to their operation.

One of the first cases in which, what may be termed the liberal doctrine, was followed was that of the *Dayton Mining Co. v. Seawell*, decided by the Supreme Court of Nevada.⁽⁷⁾ The action was brought under a state statute, which provided that mining, milling, smelting or other reduction of ores were declared to be for the public use, and that the right of eminent domain might be exercised therefor. The district court, following the precedent of California, held that the statute was unconstitutional. This decision was, however, reversed by the Supreme Court. Said Justice Hawley: "The reasons in favor of sustaining the act under consideration are certainly as strong as any that have been given in support of the mill-dam or flowage acts, as well as some of the other objects heretofore mentioned. Mining is the greatest of the industrial pursuits in this state. All other interests are subservient to it. * * * The present prosperity of the state is entirely due to the mining developments already made, and the entire people of the state are directly interested in having the future developments unobstructed by the obstinate action of any individual or individuals."

In the comparatively recent case of *Bailie v. Larson*,⁽⁸⁾ it appeared that the defendants had attempted to condemn a right-of-way for a tunnel across the plaintiff's property. The plaintiffs asked for an injunction, claiming that they had the right absolutely to exclude the defendants from their premises; the defendants attempted to justify their action under the federal statute, granting tunnel rights,⁽⁹⁾ and also under the state statute then existing. The court

(7) 11 Nev. 394.

(8) 138 Fed. 177.

(9) U. S. Comp. St., 1901, p. 1426.

held that under the decisions of the Supreme Court of the United States, a locator cannot by virtue of the federal statute run a tunnel through the holdings of a prior locator.¹⁰ But, said the court: "A state may enact such laws for mining easements which, under the consideration of state courts, might grant the tunnel rights claimed by these defendants. The court then examined the statute and found that it did give such a right. The court further found that the granting of this right was proper under the then recent decision of the Supreme Court of the United States."¹¹

Likewise in a comparatively recent Utah case, it appeared that the plaintiff company had brought an action to condemn a right-of-way for its aerial tramway over the defendants' mining claim; basing its right to condemn on a state statute.¹² The defendant contended that the statute was unconstitutional for the reason that the use proposed was not a public one. The Supreme Court granted the petition, and upheld the statute; basing its decision largely on the Nevada case just considered. The Utah case went up to the Supreme Court of the United States and was there affirmed. That court based its decision on the ruling in a somewhat similar case decided by it a few years before. The latter case involved the right to condemn a right-of-way across land for the purpose of an irrigation ditch, being based upon a state statute, holding that that use was a public one. The United States Supreme Court upheld the statute.¹³ The court conceded that, "In some states, probably in most of them, the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be upheld to be a condemnation for a public use, and, therefore, a valid enactment, may depend upon a number of considerations relating to the situation of

the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. * * * The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. These facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them."

This decision means much to the mining as well as to other important industries. It will probably be followed in all states which have not already committed themselves to the contrary view, and certain of them may be induced to change their positions in the case of the leading industries in their midst.

The law has been steadily tending towards subjecting the rights of the individual to the welfare of the public. The former so-called "absolute rights" of individuals have come to be regarded as only relative, and the tendency traced in the law of eminent domain constitutes but one phase of the broader movement.

R. L. McWILLIAMS.
Spokane, Wash.

BANKS AND BANKING—OFFICIALS' CHECK TO OWN ORDER.

HAVANA CENT. R. CO. v. KNICKERBOCKER TRUST CO.

Supreme Court of New York, Appellate Division, First Department. December 10, 1909.

Plaintiff corporation had a deposit account with the C. Trust Company subject to checks signed by V. as its treasurer. Between April 21, 1906, and June 15, following, V., as treasurer, drew three checks against an account payable to the order of another or himself, and signed with plaintiff's name by V. as treasurer, amounting in all to plaintiff's total deposit. These checks V. indorsed in blank and deposited them with defendant to the credit of his individual account. Defendant presented the checks to the drawee, received the proceeds, and credited them to V.'s account, which it later permitted him to withdraw. The trust company charged the checks against plaintiff's account, and closed it. Held that such checks were notice to defendant that plaintiff's treasurer was drawing its money

(10) Calhoun Co. v. Ajax Co., 182 U. S. 499.

(11) Clark v. Nash, 49 L. Ed. 1086.

(12) Highland Co. v. Strickley, 28 Utah, 215, 1 L. R. A. (N. S.) 976.

(13) 198 U. S. 1086.

for his individual benefit, and defendant, having received the money from the drawee bank, received it to plaintiff's use, and was liable to plaintiff therefor.

INGRAHAM, J.: The complaint alleges that the plaintiff is a foreign corporation and the defendant a trust company organized under the laws of the state of New York and doing business in the city of New York; that prior to February, 1906, one Van Voorhis was the treasurer of the plaintiff corporation; that prior to the 23d of February, 1906, an account was opened by the plaintiff corporation with the Central Trust Company of New York under an arrangement by which the checks drawn upon such account were to be signed by Van Voorhis as treasurer of the plaintiff corporation; that between the 21st of April, 1906, and the 15th of June, 1906, Van Voorhis drew three checks upon the deposit account of the plaintiff corporation with the Central Trust Company payable to the order of "W. M. Greenwood or C. W. Van Voorhis," signed "Havana Central Railroad Company, C. W. Van Voorhis, Treasurer," aggregating over \$59,000; that at the same time Van Voorhis, the treasurer of the plaintiff corporation, had an individual deposit account with the defendant upon which he drew checks signed by himself individually; that Van Voorhis indorsed these three checks in blank, and deposited them with the defendant trust company to the credit of his individual account, and the checks were presented to the Central Trust Company by the defendant, and duly paid, and the proceeds thereof received by the defendant; that the Central Trust Company charged these checks against the plaintiff's deposit account; that subsequently the defendant permitted the said Van Voorhis to draw upon his said account to which these checks were credited until the 17th of July, 1906, when the account was closed by the presentation to and payment by the defendant to the said Van Voorhis of checks to the full amount appearing to his credit, which included the amount that the defendant had received from the Central Trust Company on account of these checks. The complaint then alleges that the said Van Voorhis deposited the said checks and each of them in his bank account with the defendant, and used the said checks and the proceeds thereof for his own uses and purposes without any right or authority so to do, and that the said checks, and each of them, were without any consideration whatever moving from said Van Voorhis to the plaintiff herein; that said Van Voorhis had no right or authority to draw upon the said account of the plaintiff or to use its funds except for the purposes of plaintiff's business, and that plaintiff was not at any of the times men-

tioned indebted to Van Voorhis in any sum whatever; that notice or inquiry by the defendant to and of the plaintiff would have revealed and disclosed these facts, and further revealed that said Van Voorhis by drawing the said checks and each of them, and depositing them in his individual account with the defendant, was wrongfully misappropriating and converting the money of the plaintiff to his own use; that he was guilty of such misappropriation and conversion both in offering said checks for deposit with the defendant and in thereafter drawing from his aforesaid account the proceeds of the said checks, and appropriating the proceeds to his own use; that the defendant did not at any time make any inquiry of the plaintiff or any one else concerning the said checks or the transactions had therewith, and did not at any time give notice to the plaintiff concerning the said check or their offer for deposit with the defendant by Van Voorhis or any of the transactions relating in any wise thereto or had therewith.

Defendant by the demurrer concedes that Van Voorhis, the plaintiff's treasurer, having power to sign checks upon plaintiff's deposit account with its bank, signed checks in the name of the plaintiff to his own order without authority and deposited these checks with the defendant to his own individual account; that the defendant received these checks for the defaulting treasurer's individual account, collected the proceeds thereof and placed the same to the defaulting treasurer's individual credit, and subsequently paid out on Van Voorhis' the amount of such deposits. It had been for many years established in this state that, if a person holding money or property in a fiduciary capacity pays or transfers such money or property to a third party with notice of his relation to it for a purpose foreign to the trust, such third party cannot hold such money or property as against the true owner, and that, in the case of money, an action for money had and received will lie in favor of the true owner against the person who has received it with notice of its real ownership. If the defendant had knowledge that, by drawing these checks, Van Voorhis was misappropriating the corporation's money without its consent, and that the use to which Van Voorhis was putting the money was not the corporate uses, an action would lie.

We therefore come down to the question as to whether this defendant received this money with notice of the fact that it was being misapplied or misappropriated by Van Voorhis to his own use. Van Voorhis took to the defendant for deposit to his individual credit checks drawn in the name of the plaintiff by Van Voorhis as its treasurer to Van Voorhis'

own order, and offered those checks to the defendant for deposit to his (Van Voorhis') individual account. On its face this is clearly a transaction by which Van Voorhis was abstracting money from the treasury of the company to be credited to his individual account with the defendant. Certainly any bank officer looking at this check would see that Van Voorhis had drawn or was attempting to draw from the plaintiff's deposit account the sum of money there named to be paid to his own order. A person with a claim against the plaintiff corporation receiving such a check would necessarily have notice that the corporation was paying its debts with its own check. A person having an individual claim against Van Voorhis, and receiving in payment such a check to pay Van Voorhis' individual debt, would clearly have notice that Van Voorhis was using the funds of the plaintiff to pay an individual debt for which the plaintiff was not responsible. In this case Van Voorhis went to the bank, presented the check drawn by the plaintiff, acting through himself as treasurer, payable to his own order, and, indorsing it, deposited it with the defendant, which defendant accepted and received the proceeds. By that transaction the defendant became the owner of the check and its proceeds, and became personally indebted to Van Voorhis individually for the amount of the check. The effect of this transaction of which the defendant must be chargeable with notice was that the plaintiff's money had been taken from its possession and control and transferred to the defendant corporation, who, in return for the payment of that money to it, had become indebted to Van Voorhis individually for the amount that it received. This, it seems to me, placed the defendant in the same condition as if Van Voorhis had actually used the check or its proceeds to pay all individual indebtedness to the defendant with notice to the defendant of the actual ownership of the money or check used for that purpose. When this defendant received from Van Voorhis these checks and gave Van Voorhis credit for them, it became the owner of the checks or their proceeds. When or under what circumstances it discharged its indebtedness to Van Voorhis which arose upon the receipt of these checks upon deposit to Van Voorhis' personal account would seem to be immaterial. What the defendant did was to accept the checks on deposit, and thereby became indebted to Van Voorhis in their amount. Clearly, if the bank had actual notice of the fact that Van Voorhis was misappropriating the plaintiff's money, and that the transaction was thus fraudulent and unauthorized as to plaintiff, the defendant would have been liable to the plaintiff for the amount of money that it had re-

ceived. And we get back, therefore, to the question as to whether the transaction, as it stood, was notice to the defendant that Van Voorhis was misappropriating the plaintiff's money when he drew in the name of the plaintiff the checks upon the plaintiff's deposit account payable to his own order. The delivery of these checks to the defendant gave them notice of the fact that the check was the check of the plaintiff corporation, that it was drawn by Van Voorhis as its treasurer, that it was drawn to the order of Van Voorhis individually, and that Van Voorhis requested the bank to collect those checks and to become indebted to him individually for their amount. It is quite clear that the defendant could not shut its eyes to the transaction and because of the great number of checks presented or the great mass of its business or the number of its depositors refuse to see what any one receiving a check and noticing its form must see. A bank or an individual is charged with notice of any fact which appears upon the face of a transaction, and which a person exercising ordinary intelligence and having ordinary knowledge of financial affairs would appreciate and understand. It is the conceded law of this state that a check drawn upon a trust fund by a trustee or a check drawn to the order of a trustee is notice to a person taking it of the fact that the fund upon which the check is drawn or the check itself is the property of the trust, and not the personal property of the individual trustee. *Robinson v. Chemical Nat. Bank*, 86 N. Y. 404; *Gerard v. McCormick*, 130 N. Y. 261, 29 N. E. 115, 14 L. R. A. 234; *Ward v. City Trust Company*, 192 N. Y. 61, 84 N. E. 585.

In *Gerard v. McCormick*, *supra*, the plaintiffs owned a building in Wall street known as the "Glass Buildings." One Boswell was the agent, having authority to receive and deposit the rent for the buildings and to draw on that account sums due for repairs, insurance, taxes, interest on incumbrances, his own commissions, and for the usual expenses of such buildings, and then to divide by check on the account the remainder among the plaintiffs according to their respective interests. The checks were signed by "William Boswell, Agt. Glass Buildings." Boswell used a check thus drawn to pay an individual indebtedness due to the defendant. Upon plaintiff's discovering this misappropriation, an action was commenced to recover the amount of the check from the defendant, and a judgment in plaintiff's favor was sustained by the Court of Appeals. In deciding the case the court said:

"The evidence was abundant to authorize the jury to find that the amount standing to the credit of William Boswell, Agt. Glass Build-

ings,' in the Corn Exchange Bank, belonged to the plaintiffs, and that by means of the check the sum represented by it was, by the fraud of Boswell, withdrawn from the account and paid to and received by the defendant."

The fact that the account upon which the checks in this action were drawn belonged to the plaintiff, that Van Voorhis by drawing the checks and depositing them to his own credit misappropriated the plaintiff's money, and that the checks were drawn without authority are alleged in the complaint and admitted by the answer. So that we have the same facts presented in both cases. And the court then in the Gerard case, *supra*, continued:

"The remaining question is whether the evidence authorized the court to submit to the jury the question of good faith, or was sufficient to authorize the jury to find that the defendant had notice that the check was drawn against an account not owned by Boswell."

And, after calling attention to the fact that there was nothing in the case which tends to raise any question about defendant's personal good faith, except that he received a check from Boswell in payment of his individual debt signed "William Boswell, Agt. Glass Buildings," without inquiry as to the right of Boswell to so use the fund, the court said that the question presented was "whether the form of the check was sufficient to put the defendant upon inquiry as to the authority of Boswell to use the money in payment of his debt." And, after a review of the authorities, it was held that the form of the signature to the check was sufficient to put the payee on inquiry as to the right of the agent to pay his personal debt out of the fund, and that, if a person having notice that money or property is held by another in a fiduciary capacity receives it without inquiry from the agent in satisfaction of his personal debt, the sum or property so received may be recovered by the true owner unless the agent was authorized to so dispose of it. We have in the case at bar all the facts presented in the Gerard case upon which a recovery was sustained; the only difference being that in one case the check was received in payment of an individual debt, and in the other case was received as the consideration for the defendant assuming a personal obligation to the agent individually. It is upon this latter distinction that the defendant claims that it is relieved from liability. But it seems to me that this distinction has no real bearing upon the question as to the liability of the defendant. The defendant received the check drawn by plaintiff's treasurer on plaintiff's bank account, payable to the plaintiff's treasurer individually, and re-

ceived the money. The receipt of this check was notice to the defendant of those facts. And thus, when this defendant received the money chargeable with notice of the fact that this money was the plaintiff's money, concededly this defendant could not apply that money so received to the payment of a debt which Van Voorhis individually owed to the defendant so as to relieve the defendant from liability to the plaintiff for its money that defendant had received. It must be conceded that, while that money remained on deposit to the account of the treasurer individually with the defendant, the plaintiff could have maintained this action to recover the amount. It was money held by the defendant which belonged to the plaintiff, and of which fact the defendant had knowledge. Was the defendant discharged from this liability because it had paid Van Voorhis' individual checks upon it with plaintiff's money. It would not have been justified in paying the money out to discharge the individual debts of plaintiff's treasurer, although the plaintiff's treasurer had so ordered. It is not alleged or claimed that the money was paid for the benefit of or for the account of the plaintiff. The allegation, which is admitted, is that this treasurer having thus placed with the defendant bank a sum of money which belonged to the plaintiff, of which fact the defendant was chargeable, with knowledge ordered the defendant to pay it out to third persons by his individual check and for his own benefit. It seems to me clear that such a payment did not discharge the obligation of the defendant to repay to the plaintiff its money that the defendant had received, and that, therefore, a cause of action is alleged. This whole subject has been extensively reviewed by the Court of Appeals in the case of *Ward v. City Trust Company*, *supra*, and further discussion would seem quite unnecessary.

We are met in this case by an appeal to protect the financial institutions of this city from the liability that will be imposed upon them by charging them with notice of the form of all checks received on deposit. But, if an exception is to be made in favor of large institutions because of the impracticability of examining all checks presented to them, it must be made by either the legislature or the court of last resort, as the court has merely to administer the law as it finds it.

It follows, therefore, that the judgment appealed from must be affirmed, with costs, with leave to the defendant to withdraw the demurrer within 20 days and answer on payment of costs.

PATTERSON, P. J., and LAUGHLIN, J., concur.

Note—Caution by Banks in Respect of Deposits Belonging to Another than Depositor.—The principal case is evidently an extension of the rule, that a payee who receives corporate or trust funds in payment of individual debt of an officer or trustee is liable to the corporation or cestui que trust. But it has some support in authority. If we concede what is said by the dissenting opinion that the officer could have withdrawn the fund in cash, he had a right to check out for corporate purposes without exciting suspicion, it yet would make a case we think against the drawee bank and the collecting bank, though the liability of the former is not discussed. Thus Farmers' Loan & Trust Co. v. Fidelity Trust Co., 86 Fed. 541, 30 C. C. A. 247, shows how very strictly persons dealing with drafts on a principal must act. Thus a general land agent's drafts on a railroad treasurer had been honored and it was claimed that a fourth draft, payment of which had been refused, came under a course of dealings whereby the agent had been held out as having authority to draw such drafts. For this draft the agent asked a certificate of deposit in his individual name. The court denying recovery on the draft said: "When an agent draws a draft in the name of his principal and receives from a bank money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft; that is to say as agent. But when the agent, for such draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank put on inquiry as to why, for money of the principal, the agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use." Reasoning out that principle, it might be said the drawee bank and the defendant bank had from the circumstances knowledge that the treasurer of plaintiff was using corporate funds not for corporate purposes, while the mere fact of converting a deposit into cash would not carry the same inference, as cash could be thought to be needed as a more convenient method of paying corporate expenses. In Nat. Bank v. Claxton, 97 Tex. 569, 65 L. R. A. 820, it was held that a depositor, though holding money in a fiduciary capacity, may draw it out at his pleasure, but if his conduct gives the bank any notice of misappropriation it must refuse to honor his checks.

Participation by a bank is, of course, forbidden. *Swift v. Williams*, 68 Md. 296, 11 Atl. 835; *Bank v. Clapp*, 76 N. C. 482. And this is carried even over to such accounts as those of factors. Thus, in the case of *Union Stock Yards Nat. Bank v. Gillespie*, 137 U. S. 411, the court, after stating that the factors were known to be in the commission business, says: "Presumably moneys deposited by them were the proceeds of cattle consigned to them for sale. Their business being known to the bank, such presumption goes with their deposits; and, while not of itself notice, is a circumstance to compel inquiry on the part of the bank in respect to any particular deposit. * * * When these gather around any deposit or line of deposits circumstances of

a peculiar nature, which individualize that deposit or line of deposits, and inform the bank of peculiar facts of equitable cognizance, it is debarred from treating that deposit as that of moneys belonging absolutely to the depositor."

In *Clemmer v. Drovers' Nat. Bank*, 157 Ill. 206, 41 N. E. 728, the bank was held to have no right to apply moneys in a factor's account in payment of its own demands, as it could have done in an individual account.

A case similar to these was that of *Union Stock Yards Nat. Bank v. Moore*, 79 Fed. 705, 25 C. C. A. 150, and the court held where a deposit was made by a live-stock commission agent and factor then indebted to the bank, that the action depended upon litigated questions of fact, whether the consignors were, in equity, the owners of the money when it was deposited in the bank and whether the bank knew or had reason to believe that it so belonged and in the hands of the depositor as an agent or factor.

These kinds of account would seem to be dangerous for a bank to carry—a hardship not so much in the fact of a bank not being able to apply any part to its indebtedness to it, as depending upon whether as a fact a bank might be held when it should have known moneys were being misappropriated. As to indebtedness to a bank it ought to inquire into its borrower's solvency before lending and it ought to take into account such deposits, however large they are in amount, as these might, as business experience shows, indicate little or nothing in this way.

The rule of caution fairly deducible from the principal case and that of *Farmers' Loan & Trust Co.*, *supra*, seems a little severe, but it has a simplicity about it preventing banks from getting entrapped. If a bank may have a very inconsiderable interest in the transaction, it is no hardship to forego any participation therein. If money is being misappropriated, or any circumstance may lead a bank to thus reasonably suppose it may easily keep its skirts clear.

C.

JETSAM AND FLOTSAM.

THE LAW OF THE AIR.

The recent successful attempts at aviation open up a new and interesting field of legal inquiry. In the not distant future the aeroplane is likely to become a common means of transportation. This will necessitate the enactment of laws defining the relative rights of those who, *Ariel-like*, traverse the viewless pathway of the air, and of those terrestrial dwellers whose rights of person and property are likely to be infringed.

The St. Joseph (Mo.) Press states that Governor Hughes, of New York, believes that legislation will soon be necessary to control airships, and favors the prompt enactment of laws defining the right of aeroplanes to fly over others' property, and restricting or regulating the carrying of passengers.

Chief Justice Baldwin, of the Connecticut Supreme Court, recently lectured on this subject before the Yale law school, holding that the common-law ownership theory, would have to be modified to meet the conditions of modern progress. The theory of the common law has

been that owners of the soil own all that is directly above and directly beneath their property, to an indefinite extent. On this theory, if a man owns all the atmosphere above him, no other man has a right to cross it with aeroplane or dirigible balloon without his consent. It would be trespass. Such machines are now very few in number, and are quite welcome to go where their owners will, but in time they may become numerous and develop unsuspected dangers. One a year flying over a man's house might be a negligible menace, but forty or fifty a day, with ropes dangling, ballast falling, anchors hanging, motors in danger of exploding, and the whole machine liable to drop and set fire to or smash crops or dwellings,—would be an entirely different matter.

Justice Baldwin thinks that a landowner's control of the air above his property must be limited to the exclusion only of that which may be a danger to him or an injury to his property. In a word, he cannot stop the flying machines, but if they should damage his trees, inconvenience or sicken his family by the smoke or smell, imperil his safety, or injure him, he would have cause for action and would be able to get redress. Existing laws would probably uphold claims for injuries thus inflicted, but the conditions of aero-navigation are so unstable and uncertain that very carefully prepared laws will be needed to define the rights and privileges of all parties.—Case and Comment.

CORRESPONDENCE.

THE AMERICAN CORPUS JURIS—A CRITICISM.

Editor Central Law Journal:

I have read with interest your editorial on the proposed American corpus juris (in other words, as you hint, a new cyclopedia). I think your article contains the germ of a great idea, which is, if I may attempt to state it, that if we are going to have a reformation of our law, it must be accomplished by some great mind which understands and is able to elucidate the fundamental principles of the law. As you very well say, the work described in the Green Bag will be nothing else "than a collection of exceedingly valuable monographs on special subjects of law." If our law has to be restated by the three gentlemen named, or by any other three, it will probably never be restated.

Justinian made the greatest re-statement that has ever been attempted, and it is open to debate whether he would not have done better to have adopted Ulpian entire than to have turned him over to Trebonian and his entire editorial staff and cut him up piecemeal.

Ulpian was the great leader—dismembered by Justinian. Bacon was the next, only to be treated in the same way by Coke and Blackstone, and the result is that we have no scientific statement of our law to-day.

Some of us think we see some good in Mr. Hughes' Grounds and Rudiments of the Law. And it seems to me that a question would be pertinent addressed to those who propose this magnificent legal establishment, whether such a work as Grounds and Rudiments of Law does not contain all that is fundamental in the law, and, if it does not, what it is that it fails to contain, except immense elaboration.

There is evidently a great move on toward the rehabilitation of the legal profession, and your editorial has struck the keynote. I believe that if you follow it up, you will not only be building up your Journal in making it a leader among the legal profession, but you will be doing a tremendous service to the profession itself as well.

It would be a great mistake, in my humble opinion, to have the proposed foundation started upon wrong lines, and it lies in your power to have it started along the true lines.

Yours very truly,

EDWARD D'ARCY.

St. Louis, Mo.

(Note.—We appreciate these kind words of our correspondent, and it encourages us to believe we are voicing the protest of the great body of active practitioners.

When a general synthetical presentation of the whole law and its great principles are desired, what is better than Broom's Legal Maxims, Bacon's Ordinances, or, in these modern days, Hughes' Grounds and Rudiments of Law. This latter work, which is based on the two older works mentioned, together with copious references to Smith's Leading Cases and some of the more important of the modern authorities, crowds together in the smallest space possible all of the great fundamental principles of the law and illustrates their application as far as possible to modern conditions.

This is as far as any synthetical work can go and be of value to the profession. True, it can go backwards and historically examine the origin of every rule and principle of law, but such investigation is wholly academic so far as any practical purpose is served. If it proceeds into the realm of present-day legal controversies, it becomes immediately involved in bitter contention that must inevitably discredit its authority and place it on the level of any other encyclopedia, except so far as some particular monograph may excell in excellence, as a monograph, anything before written on such subject.—Editor.)

HUMOR OF THE LAW.

Samuel Untermeyer was being congratulated at the Manhattan Club on his recent successful conduct of a murder case.

The distinguished corporation lawyer modestly evaded all these compliments by the narration of a number of anecdotes of criminal law. "One case in my native Lynchburg," he said, "implicated a planter of sinister repute. The planter's chief witness was a servant named Calhoun White. The prosecution believed that Calhoun White knew much about his master's shady side. It also believed that Calhoun, in his misplaced affection would lie in the planter's behalf.

"When on the stand Calhoun was ready for cross-examination, the prosecuting counsel said to him sternly:

"Now, Calhoun, I want you to understand the importance of telling the truth, the whole truth, and nothing but the truth in this case."

"'Yas, sah.' said Calhoun.

"'You know what will happen, I suppose, if you don't tell the truth?'

"'Yas, sah,' said Calhoun, promptly. 'Our side'll win de case.'"

WEEKLY DIGEST.

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1. Action—Surviving Partner.—An action by a surviving partner is in his own right, so that he may join another claim involving an individual transaction.—*Murphy v. Cochran*, Iowa, 123 N. W. 349.

2. Adjoining Landowners—Spite Fences.—The malicious construction of a spite fence by defendant on his own land, cutting off plaintiff's view, light and air, held a nuisance entitling plaintiff to recover damages.—*Barger v. Barringer*, N. C., 66 S. E. 439.

3. Admiralty—Validity of Mortgage.—Where libel for possession of vessel involves a mortgage, and requires consideration of the question of fraud and mistake, jurisdiction will not be entertained.—*The Helys*. U. S. D. C., S. D. N. Y., 173 Fed. 928.

4. Arbitration and Award—Agreement to Arbitrate.—Agreements to arbitrate will be upheld, where the power to pass upon the subject-matter in dispute is given the arbitrator.—*Conneaut Lake Agricultural Ass'n v. Pittsburgh Surety Co.* Pa., 74 Atl. 620.

5. Assignments for Benefit of Creditors—Agreement Among Creditors.—A committee elected by creditors to take charge of the business of the debtor does not have the authority of a syndic and cannot sue and hold a creditor bound who took no part in the proceedings.—*Casanas v. Audubon Hotel Co.* La., 50 So. 714.

6. Attachment—Corporate Shares.—At common law corporate shares were not subject to attachment, not being considered as a chattel or a debt.—*Fowler v. Dickson*, Del., 74 Atl. 601.

7. Bailment—Liability of Bailee.—A gin company held not liable to the owner for the loss of a bale of cotton after it was baled and placed in the company's yard with notice to the owner; there being no showing of negligence.—*Batesville Gin Co. v. Whitten*, Miss., 60 So. 695.

8. Bankruptcy—Corporations Subject to Act.—A corporation, engaged in generating electricity, transmitting it, and selling power and light to consumers, is neither a manufacturing nor a mercantile corporation, within the meaning of Bankr. Act, and is not subject to adjudication as an involuntary bankrupt.—*In re Hudson River Electric Power Co.* U. S. D. C., N. D. N. Y., 173 Fed. 934.

9. Jurisdiction of Courts.—Where a third party claims an interest in property which was in the possession of a bankrupt at the time of the bankruptcy and passed into that of his trustee, the referee may by a summary proceeding require such third party to appear in the bankruptcy court and present his claim, and may adjudicate the rights of the parties in respect thereof.—*Mound Mines Co. v. Hawthorne*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 882.

10. Sale of Property in Dispute.—An order of a referee confirmed, which restrained a sale by a corporation of which the bankrupt was manager of its property pending a determination of its ownership.—*In re Berkowitz*, U. S. D. C., N. D. N. J., 173 Fed. 1013.

11. Banks and Banking—Discounts.—Where a person induced a bank to discount a note by false representations, the bank could cancel the credit given, and, having done so, the person's administratrix, upon his death, could not recover it.—*Flatow v. Jefferson Bank*, 119 N. Y. Supp. 860.

12. Mistake in Crediting Account.—A bank held not liable to a customer, where he handed in his bank book and checks and a deposit slip, headed with the name of another customer, and the checks were entered from the slip in the customers' ledger to the credit of the other customer.—*Schwartz v. State Bank*, 119 N. Y. Supp. 763.

13. Promise to Pay Debt of Another.—The guaranty by a bank, without benefit to itself, of the debt of another in which it has no interest, held beyond its powers.—*Mine & Smelter Supply Co. v. Stockgrowers' Bank*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 859.

14. Bills and Notes—Acceptance of Draft.—A telegram sent by a bank addressed to another bank stating that it would honor a person's draft for a specified sum is an acceptance of a draft for such sum from which the bank may not recede.—*Wells v. Western Union Telegraph Co.* Iowa, 123 N. W. 371.

15. Delivery.—Title to notes intended to be given to intestate's son but not delivered, passed upon her death to the administrator, and the delivery thereafter not according to statute, to the son, did not pass title.—*Burchet v. Fink*, Mo., 123 S. W. 74.

16. Taking Without Notice.—The phrase "without notice," used in relation to the taking of a note, usually refers to some defense of the maker or to some claim in title to it other than that of the seller, with or without notice of which a purchaser has taken it.—*Vansickle v. Watson*, Tex., 123 S. W. 112.

17. Carriers—Act of God.—A snowstorm, which obstructed defendant's yard, held an "act of God," so as to relieve defendant from liability for nondelivery of the passengers.—*Cormack v. New York, N. H. & H. R. Co.* N. Y., 90 N. E. 56.

18. Compromise and Settlement—Consideration.—Where a right is disputed and a compromise ensues, the compromise is supported by a sufficient consideration, and it will not be disturbed on it subsequently appearing that one of the parties thereto had no right in law.—*Wood v. Kansas City Home Telephone Co.* Mo., 123 S. W. 6.

19. Constitutional Law—License Tax on Hawkers and Peddlers.—Laws 1909, p. 293, c. 248 imposing a license tax on hawkers, peddlers, and transient merchants, and declaring that it shall not apply to the solicitation by permanent merchants from customers resident in the same or an adjoining county, held not to act uniformly upon all permanent merchants, and to be in violation of Const. art. 4, secs. 33, 34.—*State v. Parr*, Minn., 123 N. W. 408.

20. Contracts—Completion of Building.—Where building material was furnished under a contract providing for payment of the price on completion of the building, the price was recoverable on the owner's failure to complete the work within a reasonable time.—*De Long v. Zeto*, 119 N. Y. Supp. 765.

21. Construction.—Lessee of a ferry held not bound to pay the retiring lessee for a sidewalk and pavement for which the retiring lessee was not entitled to be paid under his lease.

—Union Ferry Co. v. Southern Improvement & Ferry Co., La., 50 So. 704.

22.—**Ignorance of Contents.**—Where a party having the ability to read and understand instrument fails to do so and signs it without reading, he is bound unless fraud was practiced on him.—*Bloss v. Chicago & N. W. Ry. Co.*, Iowa, 123 N. W. 360.

23. **Copyrights—Assignment.**—An assignee's copyright of certain cartoons entitled "Buster Brown" did not give to the assignee the exclusive right to the use of the title.—*Outcault v. Lamar*, 119 N. Y. Supp. 930.

24. **Corporations—Authority of General Manager.**—In the absence of proof as to the nature of services or powers of a corporation employee designated "General Manager," the words would simply import that he is a general executive officer for all the ordinary business of the corporation. An authority to purchase an automobile cannot be presumed.—*Studebaker Bros. Co. v. R. M. Rose Co.*, 119 N. Y. Supp. 970.

25.—**Duress.**—Proof that the president of a corporation permitted it to execute a contract because of threats of the adverse party to criminally prosecute him and others for swindling unless the contract was executed established a case of duress.—*International Land Co. v. Farmer*, Tex., 123 S. W. 196.

26.—**Liability of Officers.**—While the vice president of a corporation would be personally liable for injury to another caused by his actual fraud, such agent is not liable to third persons for negligence or nonfeasance.—*Ray County Sav. Bank v. Hutton*, Mo., 123 S. W. 47.

27.—**Sale of Corporate Stock.**—Where a seller of corporate stock agreed unconditionally to sell it for the buyer within a year, so as to net her a certain amount, a tender of the stock to the seller for sale was unnecessary.—*Aken v. Clark*, Iowa, 123 N. W. 379.

28. **Costs—Taxation.**—In view of Supreme Court rule 2, appellants, not notified of the decision on rehearing, held entitled to have the original record recalled for the purpose of taxing costs and disbursements in the Supreme Court.—*Clark v. Lawrence County*, S. D., 123 N. W. 868.

29. **Courts—Amendment by Nunc Pro Tunc Order.**—A court may amend its record by a nunc pro tunc order so as to make it speak the truth, but not to make it speak what it ought to have spoken.—*Bouldin v. Jennings*, Ark., 122 S. W. 639.

30.—**Jurisdiction.**—A creditor remitting a part of his debt to bring it within the jurisdiction of the court forgives the excess of the debt.—*Merywethers v. Youmans*, Kan., 105 Pac. 545.

31. **Covenants—Breach of Warranty.**—A purchaser resisting an action by a third person to locate a tramroad through the land held entitled to recover from the vendor the costs incurred and a reasonable attorney's fee.—*Helton v. Asher*, Ky., 123 S. W. 285.

32.—**Action for Breach.**—Where it was not shown that one to whom land was conveyed took possession for plaintiff's benefit, or that plaintiff had any interest therein except by a subsequent conveyance, he could not maintain an action for breach of a covenant of seisin.—*Graves v. Garard*, Ind., 90 N. E. 22.

33. **Criminal Law—Comments of Judge on Defense.**—Prejudicial comments of the judge on the defense in a criminal case held not cured by their withdrawal, but to entitle the defendant to a reversal and new trial.—*Rudd v. United States*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 912.

34.—**Confessions.**—Where, on an arson trial, the only proof of the corpus delicti, outside of a confession, was that two barns were burned at midnight, and the confession was shown to have been induced by promises of protection from punishment, a conviction held unwarranted.—*De Vore v. State*, Ga., 66 S. E. 484.

35. **Criminal Trial—Disposition of Cause.**—Where the record in a criminal case discloses no error in the trial, but does not show that accused was present at the rendering of judgment of imprisonment, the case may be re-

manded, with directions to enter judgment having accused present at the time.—*State v. Randolph*, Mo., 123 S. W. 61.

36.—**Judicial Notice.**—The court takes judicial notice that it would not be unnatural for the commonwealth's attorney to state, on hearing that a homicide of an unusual character had been committed, that he would prosecute the case with all his power.—*Hargis v. Commonwealth*, Ky., 123 S. W. 239.

37. **Criminal Law—Threat of Perjury Prosecution.**—That witnesses were told that the district attorney had said he would prosecute for perjury if they did not tell the truth, held not ground to set aside a conviction.—*State v. Williams*, La., 50 So. 711.

38. **Courtesy—Right to Income of Land.**—Where unmined coal land is sold by the remainderman and the tenant by the courtesy, such latter has the right to the whole income during his life.—*Deffenbaugh v. Hess*, Pa., 74 Atl. 608.

39. **Creditors' Suit—Judgment Against but One Partner.**—A firm creditor, who obtains a judgment against one partner only, may not follow firm assets in the hands of third persons holding under a chattel mortgage, executed by such partner to secure his individual debts.—*Rumsey-Sikemeler Co. v. Bank of Aurora*, Mo., 123 S. W. 75.

40. **Damages—Excessive Verdict.**—A verdict for \$4,750 for injury to a telephone lineman by which he permanently lost the use of his right arm, underwent several operations, suffered much pain, and was confined to the hospital for a considerable time held not excessive.—*Clark v. Johnson County Telephone Co.*, Iowa, 123 N. W. 327.

41. **Election of Remedies—Mistake as to Remedy.**—The doctrine of the election of remedies applies only when a plaintiff, in fact, has two or more remedies; and a misconception of plaintiff's right to sue or to sue by a particular form of action is not an election of remedies.—*Wells v. Western Union Telegraph Co.*, Iowa, 123 N. W. 371.

42.—**Right to Assert Legal Title.**—Plaintiffs asserting a claim to land may forego their equity to redeem from a foreclosure sale under the mortgage, and rely solely on a legal title, which they already held, notwithstanding the mortgage.—*McFarland v. Cornwell*, N. C., 68 S. E. 454.

43. **Eminent Domain—Cutting Ice.**—A health regulation, forbidding horses and men from going on ice, on lakes and ponds which were the source of water supply of cities and villages, to harvest the ice, held invalid.—*People v. Kirk*, 119 N. Y. Supp. 862.

44. **Estoppel—Acts Constituting.**—One may not deny that which he has asserted to be true, though he was in error as to the truth.—*Criley v. Cressel*, Iowa, 123 N. W. 348.

45. **Evidence—Attempt to Compromise.**—Letters passing between the parties in an attempt to effect a compromise held inadmissible.—*Welker v. Appleman*, Ind., 90 N. E. 85.

46.—**City Ordinances.**—The Supreme Court will not take judicial notice of a city ordinance.—*Burke v. Tricall*, La., 50 So. 710.

47. **Executors and Administrators—Right to Administer.**—An adopted child acquires no right to administer on the estate of his adopting parent.—*In re Smith's Estate*, Pa., 74 Atl. 627.

48. **Explosives—Care Required.**—The degree of care required of persons using such dangerous instrumentalities as dynamite in their business is of the highest, and what might be reasonable care in respect to grown persons of experience would be negligence as applied to children.—*Wood v. McCabe & Co.*, N. C., 66 S. E. 433.

49. **Fire Policy—Exceptions in Policy.**—Where a fire policy contained an exception that the company would not be liable for loss caused by explosion of any kind unless fire ensued and in that event for the damage by fire only, a loss occurring solely from an explosion, not by a preceding fire or by an explosion which occurred from the contact of escaping natural gas with a lighted match, held within the ex-

ception of the policy.—*Stephens v. Fire Ass'n of Philadelphia*, Mo., 123 S. W. 63.

50. **Fish—Seine Fishing.**—Under Code Supp. 1902, secs. 2539, 2540, 2547, seine fishing held prohibited in a nonnavigable slough formed by the separation of a part of the Mississippi River, cutting off an island from the mainland and wholly within the state of Iowa.—*Little v. Green*, Iowa, 123 N. W. 367.

51. **Fixtures—Fences.**—If a fence on a farm appeared to be a permanent one, a purchaser of the farm was entitled thereto, though it was erected by a tenant under an agreement with a former owner that he might remove it at the end of the term, unless the purchaser had actual notice of such agreement.—*Esther v. Burke*, Mo., 123 S. W. 72.

52. **Fraud—Representation.**—To enable a person injured by a false representation to sue for damages, held not necessary that the representation should have been made to him directly.—*Wells v. Western Union Telegraph Co.*, Iowa, 123 N. W. 371.

53. **Frauds, Statute of—Debt of Another.**—A parol contract between creditors held not within the statute of frauds as a promise to pay the debt of another.—*Hotmire v. O'Brien*, Ind., 90 N. E. 38.

54. **Garnishment—Service of Summons.**—Service of summons upon a corporate garnishee by service upon the officers designated by statute, as well as upon a personal garnishee, takes effect immediately so as to make the garnishee liable for any subsequent violation of his duty.—*Fowler v. Dickson*, Del., 74 Atl. 601.

55. **Gas—Unlawful Discrimination.**—A gas company, with the right under its charter to operate in several towns and cities in the state is not guilty of an "unlawful discrimination" as to one of such cities by abandoning its franchise and withdrawing its property and business therefrom.—*East Ohio Gas Co. v. City of Akron, Ohio*, 90 N. E. 40.

56. **Habeas Corpus—Judgment.**—A final judgment of a judge dismissing a writ of habeas corpus held res judicata of a similar court proceeding between the same parties for the same relief filed pending the proceedings before the judge.—*Ex parte Fuller*, Tex., 123 S. W. 204.

57. **Health—Tenement Houses.**—In an apartment house held a tenement house, within Tenement House Law (Laws 1901, p. 889, c. 334) sec. 2, subd. 1.—*Grimmer v. Tenement House Department of City of New York*, 119 N. Y. Supp. 812.

58. **Homestead—Abandonment.**—The determination of a husband to abandon his homestead is binding on his wife, who remained with him in his absence from the country.—*Rockwell Bros. & Co. v. Hudgens*, Tex., 123 S. W. 185.

59. **Homicide—Justification.**—If a person believed that another was going to assault the person's brother, such person could defend his brother to the extent that the brother could defend himself.—*Griffin v. State*, Tex., 122 S. W. 553.

60. **Husband and Wife—Action for Price of Necessaries.**—Where the petition, in an action against a husband for a debt contracted by his wife, was based on the theory that the debt was for necessaries furnished her, plaintiff could not recover on the ground that defendant authorized his wife to contract the debt, since the allegations and proof must correspond.—*Fields v. Florence*, Tex., 123 S. W. 187.

61.—Duty to Maintain Wife.—Where there is no relation that legally imposes the duty of the wife's maintenance on the husband the law gives no power to make him maintain her.—*Chapman v. Parsons*, W. Va., 66 S. E. 461.

62.—Liability of Wife on Contract.—Under Rev. St. 1895, art. 2970, a wife held not liable on a contract to pay commissions for the sale of her separate property.—*Billingly v. Swenson Land Co.*, Tex., 123 S. W. 194.

63. **Indictment and Information—Averring Matters of Judicial Notice.**—Courts will take judicial notice of the holding of a general election and its result, so that, in a prosecution for violating the state prohibition law, the indictment need not allege the holding of the elec-

tion, and that it resulted in favor of prohibition.—*State v. Swink*, N. C., 66 S. E. 448.

64.—Sufficiency.—It is the declared policy of the legislature, as well as of the court, to uphold indictments and informations whenever there has been a substantial compliance with the statutory requirements.—*Tillman v. State*, Fla., 50 So. 675.

65. **Interest—Right to Compound Interest.**—An express promise to pay compound interest included in an account stated would be a nullum pactum, and unenforceable, in absence of consideration therefor.—*Reusers v. Arkenbaugh*, 119 N. Y. Supp. 821.

66. **Interstate Commerce—Regulation.**—Act Cong. March 4, 1907, c. 2939, sec. 2, 34 Stat. 1416 (U. S. Comp. St. Supp. 1909, p. 1170), regulating the hours of labor of train dispatchers, etc., held not invalid as applying to both interstate and intrastate commerce.—*People v. Erie R. Co.*, 119 N. Y. Supp. 873.

67. **Intoxicating Liquors—Drug Stores.**—A pharmacist cannot defend an action to enjoin the conduct of his business as a liquor nuisance because no illegal sales of liquor were made by him personally.—*Stromert v. Johnson*, Iowa, 123 N. W. 336.

68.—Prosecution Under Local Option Law.—Time not being of the essence of the offense of selling liquors in violation of the local option law, the allegation as to date of sale in the information held wholly immaterial under Rev. St. 1899, sec. 2535 (Ann. St. 1906, p. 1509).—*State v. Randolph*, Mo., 123 S. W. 60.

69. **Judges—Burden of Proving Prejudice.**—The burden of proof is on defendant in a criminal prosecution, who alleges that the judge will not give him a fair trial.—*Hargis v. Commonwealth*, Ky., 123 S. W. 239.

70. **Judgment—Res Judicata.**—A decision of the court in an action by legatees against an executrix adverse to the executrix held res judicata upon her final accounting.—*In re Walsh's Estate*, N. J., 74 Atl. 563.

71. **Landlord and Tenant—Injury to Tenant's Goods.**—A landlord in a lease held not liable for leakage of the roof simply because the roof was in bad condition ascertainable by the exercise of ordinary care.—*Pratt, Hurst & Co. v. Tailor*, 119 N. Y. Supp. 803.

72.—Lease.—The leniency of a landlord in not insisting on prompt payment of the rent does not constitute a waiver of his right to forfeit lease for nonpayment.—*O'Connor v. Timmermann*, Neb., 123 N. W. 443.

73. **Larceny—Innocent Possession.**—Failure of accused to apply for a subpoena for the person from whom he claimed to have purchased the stolen property held competent, on the issue of defendant's claim of innocent possession.—*Cleveland v. State*, Tex., 123 S. W. 142.

74. **Libel and Slander—Actionable Words.**—The test whether a newspaper article is libelous per se is whether, to the mind of an intelligent man, the tenor of the article and the language used naturally import a criminal or disgraceful charge.—*Church v. Tribune Ass'n*, 119 N. Y. Supp. 886.

75. **Life Insurance—Breach of Warranty.**—A prior rejection of insured by another company was most material, and a false statement in respect thereto was a clear breach of his warranty as to the truth of statements on his application, offered as a consideration of the contract.—*Fletcher v. Bankers' Life Ins. Co. of City of New York*, 119 N. Y. Supp. 801.

76. **Limitation of Actions—When Cause of Action Accrues.**—If one acquires land pursuant to an agreement to convey it to another on payment of the purchase price, the cause of action for specific performance, or enforcement of the trust, if any exists, arises when he acquires the title.—*Hoffman v. Buchanan*, Tex., 123 S. W. 168.

77. **Mandamus—Calling Stockholders' Meeting.**—Mandamus cannot be granted upon the relation of a foreign holding corporation to compel the secretary of a like corporation to call a meeting of its stockholders to change the articles of incorporation of two other foreign corporations.—*State v. De Groat*, Minn., 123 N. W. 417.

78. Master and Servant—Contract of Hiring.—A hiring for an indefinite term at so much per month or year is a hiring at will and may be terminated in good faith by either party at any time without incurring liability.—*Brookfield v. Drury College*, Mo., 123 S. W. 86.

79. Contributory Negligence.—Where two methods of moving a car from one track to another are apparent, whether a brakeman adopted the safer or more dangerous one is a question for the jury.—*Richardson v. St. Louis & H. Ry. Co.*, Mo., 123 S. W. 22.

80. Failure to Guard Machinery.—Under Act May 2, 1905 (P. L. 352), requiring machinery of every description to be guarded, a master is responsible for failure to guard the same, though it is customary not to guard the machinery in question.—*Jones v. American Carmel Co.*, Pa., 74 Atl. 618.

81. Injury to Servant.—Defendant held not liable for the death of a miner due to material falling from the roof, unless defendant was bound to furnish sufficient proper props on request and its failure to do so was the proximate cause of the injury.—*Lammey v. Center Coal Mining Co.*, Iowa, 123 N. W. 356.

82. Proximate Cause of Injury.—Where cars were negligently left standing on a side track at the top of a grade by defendant's employees without being secured, except by the setting of the brakes, and one of such cars ran down upon and killed plaintiff's intestate, the fact that the brake was released by children playing about the cars did not constitute such an intervening cause as would prevent defendant's negligence from being the efficient proximate cause of the injury.—*Wellington v. Peltier*, U. S. C. C. of App., First Circuit, 173 Fed. 908.

83. Safe Place to Work.—Notice to telephone employee that the master does not inspect the wires, etc., held not to relieve company of the duty to furnish a reasonably safe place, independent of its poles, cross-arms and wires, in which to work.—*Olson v. Nebraska Telephone Co.*, Neb., 123 N. W. 422.

84. The Relation.—A pumper whose duties required him to ride between pumping stations on the company's trains upon a pass given him for that purpose was as much in the company's service while necessarily riding between such stations in the proper place on the train as when operating the pumps.—*Kunza v. Chicago & N. W. Ry. Co.*, Wis., 123 N. W. 403.

85. Violation of Rules.—While the conduct of an employee in violating a rule promulgated by the master may be contributory negligence as a matter of law, if it was contrary to common prudence, yet if, under the facts, the servant might be justified in disregarding the rule, the question of his negligence in doing so is for the jury.—*Houston & T. C. R. Co. v. Ravanello*, Tex., 123 S. W. 208.

86. Violation of Rule.—While the violation by a servant of a rule of the master or of a statutory duty is contributory negligence, to defeat a recovery for a personal injury, it must have proximately caused or contributed to the injury.—*Miami Coal Co. v. Kane*, Ind., 90 N. E. 13.

87. Mines and Minerals—Construction of Oil Lease.—The oil from a well drilled by a lessor during the term of an unreleased part of the land without the lessee's consent held to belong to the latter and to be apportionable under the terms of the lease.—*O'Neill v. Sun Co.*, Tex., 123 S. W. 172.

88. Estoppel.—A grantee of the owners of a mining claim, which took out a patent in the names of prior owners and their heirs and assigns, held not thereby estopped from asserting that the interest of one of such patentees had previously been forfeited to his co-owners under the statute.—*Van Sice v. Ibex Mining Co.*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 895.

89. Injunction.—In a suit for an injunction to restrain a lessor from interfering with the lessee's mining operations, held not necessary for the petition to allege that barytes or other minerals were in the land in paying quantities, in order to show that the lessee would suffer material injury thereby.—*Dix River Barytes Co. v. Pence*, Ky., 123 S. W. 263.

90. Mining Partnership.—Members of a mining partnership not agreeing, those having the majority interest held entitled to control its management.—*Bartlett & Stancliff v. Boyles*, W. Va., 66 S. E. 474.

91. Monopolies—Combination Prohibited.—The organization by a number of jobbing houses of a brokerage company to do their own brokerage business in purchasing merchandise from manufacturers and others, and also a general brokerage business, held not to constitute a combination or conspiracy in restraint of interstate commerce or to monopolize such commerce, in violation of the Sherman anti-trust act.—*Arkansas Brokerage Co. v. Dunn & Powell*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 899.

92. Mortgages—Mortgagor in Possession.—One succeeding to the rights of a mortgagor under an attempted foreclosure does not thereby become a mortgagor in possession, unless he enters lawfully, or his possession becomes lawful by acquiescence of the owner.—*Deutsch v. Haab*, 119 N. Y. Supp. 311.

93. Sale Under Mortgage.—A mortgage not under seal conferred no right of possession on persons claiming under a foreclosure sale of the land by the mortgagor, but only a bare equity requiring intervention of a court at their instance to charge the land with the money loaned.—*McFarland v. Cornwell*, N. C., 66 S. E. 454.

94. Municipal Corporations—Fire Limits.—A city ordinance prohibiting construction of wooden building in fire limits held not violated by repairing a wooden building.—*City of Mayville v. Rosing*, N. D., 123 N. W. 393.

95. Negligence of Independent Contractor.—A city held liable to a traveler injured by running into a wire placed around a new sidewalk by an independent contractor.—*Powell v. City of Waterloo*, Iowa, 123 N. W. 346.

96. Pollution of Stream.—A riparian owner, injured by nonpermanent pollution of a water course, held entitled to recover the diminution in the rental value of the land rented and the diminution in the value of the use of the land he occupied.—*City of Georgetown v. Kelly*, Ky., 123 S. W. 251.

97. Validity of Ordinance.—That a city ordinance punishing an offense imposed heavier penalties than the state law punishing the same offense did not render the ordinance invalid as inconsistent with such state law.—*Rossberg v. State*, Md., 74 Atl. 581.

98. Negligence—Effect of Intoxication.—A person who has become intoxicated by his own voluntary act is chargeable with the result of his acts, deemed by the law to constitute contributory negligence, in the same degree and to the same extent as though he had been duly sober.—*Little Rock Ry. & Electric Co. v. Billings*, U. S. C. C. of App., Eighth Circuit, 173 Fed. 903.

99. Officers—Compensation.—A state, county or municipality, which before judgment of ouster against a de facto officer pays him the salary due at the time, is protected against any liability to the de jure officer for such salary.—*Walters v. City of Paducah*, Ky., 123 S. W. 287.

100. Partnership—Pleadings.—The words "surviving partner" of a certain firm following plaintiff's name, held not part of the title of the cause, and did not prevent plaintiff from recovering on a partnership debt on an assignment of his partner's interest, though the partner was not dead.—*Murphy v. Cochran*, Iowa, 123 N. W. 349.

101. Rights of Firm Creditors.—A firm creditor held not entitled to subject firm property to the payment of his debts as against a disposition by the sole remaining partner.—*Rumsey-Sikemeier Co. v. Bank of Aurora*, Mo., 123 S. W. 75.

102. Penalties—Actions.—Where the procedure is by penal action, as many violations of the law of the same grade and punishment may be set out as the state desires, because this practice is distinctly authorized by the Code.—*Allison v. Commonwealth*, Ky., 123 S. W. 267.

103. Principal and Agent—Purchasing Agent.—Payment by a principal of money advanced

by his agent for the purchase of wool became due to the agent without reference to a delivery of the wool.—*Welker v. Appleman*, Ind., 90 N. E. 35.

104.—**Undisclosed Principal.**—Where an agent makes a contract for the transportation of goods without disclosing the fact that he is acting merely as agent, his principal may sue the carrier for injury to the goods.—*Wells v. Western Union Telegraph Co.*, Iowa, 123 N. W. 371.

105. **Property—Malicious Use.**—A person may not use his own property maliciously for the sole purpose of injuring another.—*Barger v. Barringer*, N. C., 66 S. E. 489.

106. **Public Lands—Auditor's Certificate of Sale.**—The State Auditor is authorized to determine whether the state's school lands are agricultural, timber, or mineral, and his determination cannot be called in question after a sale of the land, except in a direct proceeding.—*State v. Red River Lumber Co.*, Minn., 123 N. W. 412.

107. **Railroads—Authority of Station Agent.**—A railroad station agent held to have implied authority to hire a person to take the place of another who had abandoned a contract to carry mail from the depot to the depot of another railroad.—*Louisville & N. R. Co. v. Vaughn's Transfer Co.*, Ky., 123 S. W. 253.

108.—**Contributory Negligence.**—Whether the average man while walking on a railroad track would look around before he had traveled 220 feet at three miles per hour, or take other precautions to learn of the approach of a train, is a question for the jury.—*Bourassa v. Grand Trunk Ry. Co.*, N. H., 74 Atl. 590.

109.—**Crossing Accident.**—Evidence of careful habit held insufficient to raise the inference that deceased went on the crossing in a prudent way.—*Gibson v. Maine Cent. R. R.*, N. H., 74 Atl. 589.

110.—**Duty to Look and Listen.**—A person about to cross railroad tracks is not necessarily negligent as a matter of law in failing to continue to look and listen at all times for approaching trains, where he was misled by the railroad company, or his attention was rightfully directed to something else as well.—*Farris v. Southern Ry. Co.*, 122 S. W. 457.

111.—**Identification of Passenger on Return Ticket.**—A passenger ticket, stipulating for a return trip on the passenger identifying himself as the original purchaser, held not to provide for identification by means of the signature of the passenger alone.—*Houston & T. C. R. Co. v. Lee*, Tex., 123 S. W. 154.

112.—**Negligence.**—Whether the permitting by defendant railroad of trees and a building which obstructed the view of trains to remain on the right of way contributed to the death of one killed while attempting to cross the track held a question for the jury.—*Missouri, K. & T. Ry. Co. of Texas v. King*, Tex., 123 S. W. 151.

113. **Removal of Causes—Assignment to Prevent Removal.**—An assignment of a claim held not without consideration and fictitious authorizing the assignee to sue thereon in the state court, and thus prevent removal to the federal court.—*Wells v. Western Union Telegraph Co.*, Iowa, 123 N. W. 371.

114. **Sales—Separate Writings.**—In an action upon an agreement guaranteeing certain earnings on two shares sold to plaintiff in a stallion, a prior written guaranty as to earnings on one share of stock held properly received as part of the transaction.—*Worsley v. Ayres*, Iowa, 123 N. W. 353.

115. **Street Railroads—Consolidation.**—A consolidation agreement held to charge defendant with liability of the consolidated street car company to contribute to the cost of maintaining lights at a crossing over the tracks of a railroad company.—*Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.*, Tex., 123 S. W. 124.

116.—**Duty of Motorman.**—A street railway motorman approaching a crossing is only bound to observe persons or vehicles approaching the track within the ordinary range of his vision while looking ahead.—*South C. & C. St. Ry. Co. v. Crutcher*, Ky., 123 S. W. 268.

117.—**Injury to Person on Track.**—A person, seeing a rapidly approaching street car and attempting to cross the street in front of it to board it on the other side of the street held negligent.—*Flynn v. Joline*, 119 N. Y. Supp. 783.

118.—**Negligence.**—A motorman of a street car held not negligent in failing to observe an approaching ice wagon which collided with the car.—*South C. & C. St. Ry. Co. v. Crutcher*, Ky., 123 S. W. 268.

119. **Subrogation—Advances for Discharge of Vendor's Lien.**—One voluntarily advancing money to pay vendor's lien notes without any understanding that he shall have a lien to secure a reimbursement is not entitled to subrogation.—*Hatton v. Bodan Lumber Co.*, Tex., 123 S. W. 163.

120. **Subscriptions—Binding Effect.**—Though a contract be a mere subscription, if it be acceded to on the terms on which it is made, and labor or money expended on the faith thereof, the subscriber is bound thereby.—*National Valley Bank of Staunton v. Houston*, W. Va., 66 S. E. 465.

121. **Taxation—Funeral Expenses.**—Reasonable cost of keeping a burial plot and monument in repair is properly a part of the "funeral expenses," exempt from the transfer tax on an estate; and so a bequest of \$250, to be invested and the income used for such a purpose, is exempt.—*In re Maverick's Estate*, 119 N. Y. Supp. 914.

122. **Telegraphs and Telephones—Delay of Message.**—A seller, whose cablegram, accepting an offer, was delayed in delivery, during which time the price offered had declined, held not entitled to recover against the telegraph company.—*Western Union Telegraph Co. v. Williamson Rhett & Co.*, Miss., 50 So. 698.

123.—**Liability for Special Damages.**—A telegraph company held not liable for special damages, unless it knew, or had reason to believe from the telegram itself or from extraneous matters, that damage was likely to result.—*Wells v. Western Union Telegraph Co.*, Iowa, 123 N. W. 371.

124. **Trusts—Right to Conveyance of Land.**—Where one pays for land with his own means, another claiming that the former acquired and held the title in trust for him is not entitled to the conveyance except on repayment of the purchase price thus advanced.—*Hoffman v. Buchanan*, Tex., 123 S. W. 168.

125. **Vendor and Purchaser—Improvements by Vendee.**—On repudiation of a contract of sale the vendee may remove permanent improvements, if practicable, which do not enhance the value of the premises.—*Glass v. Hampton*, Ky., 122 S. W. 803.

126. **Wills—Conditions Subsequent.**—Where a condition subsequent to the vesting of an estate is illegal or becomes impossible of performance, nonperformance does not prevent the grantee's estate from becoming absolute.—*Jones v. Jones*, Mo., 123 S. W. 29.

127.—**Electoral Widow.**—Widow held bound by her election to take under the statute to disregard her husband's will, and could not invoke her to her advantage a certain provision therein.—*Ashelford v. Chapman*, Kan., 105 Pac. 334.

128.—**Legacies Charged on Property.**—Under a conveyance in trust, subject to a life estate in the grantor, nothing remained to the grantor's estate of certain lands in California which could be used for the payment of a legacy to his widow in exoneration of a charge on Iowa lands.—*Douglass v. Lougee*, Iowa, 123 N. W. 967.

129. **Witnesses—Confidential Relations.**—A minister who simply acted as a friend and interpreter in a matter having nothing to do with spiritual affairs is a competent witness.—*Blossi v. Chicago & N. W. Ry. Co.*, Iowa, 123 N. W. 360.

130.—**Husband and Wife.**—The common law made no distinction between the incompetency of one spouse to testify for or against the other as a matter of disability and incompetency as a matter of privilege.—*Ex parte Beville*, Fla., 50 So. 685.

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CONTINUOUS ACCOUNT UNDER MECHANIC'S LIEN STATUTES.

The disposition of courts in the enforcement of liens under mechanics' lien statutes seems to vary, but this may often be traceable to variant statutory phraseology, not attributable to judicial tendency. In every jurisdiction, however, whether the rule be to construe these statutes liberally or strictly, the status which the law impresses on a transaction or series of transactions ought to be immune from outside interference or from any act done *in invitum*. A late decision of the Supreme Court of Iowa seems to us not to have regarded this principle. *A. E. Shorthill & Co. v. Aetna Indemnity Co.*, 124 N. W. 613.

Two of the court dissented and we rely rather on the dissenting opinion for a statement of the facts than on the prevailing opinion, or, at least, for salient features which the latter opinion seemed to consider unimportant.

The facts of this case show, that the construction of a large building was let to a contractor, a corporation, under a contract providing that when the contractor refused to go on with the construction "the owners shall also be at liberty to terminate" its employment and take possession for the purpose of completion of all materials, tools and appliances on the premises, proceed to finish the work and provide materials therefor. If this happens, the contractor shall be paid nothing further until the work is completed, and nothing whatever if the expense which the owners may be put to, makes impossible any balance in the contractor's favor, and they are to pay only

what is the true balance. If expense exceeds balance due contractor, it is to pay owners the excess.

About ten days before such discontinuance the contractor ordered other material from a brick company, which was not ready for delivery until after such discontinuance and taking possession by owners had occurred. The brick was offered to owners who agreed to accept upon the understanding that the acceptance was to be upon a new agreement and not as a continuance of the account of the brick company with the contractor. The former refused to deliver upon such condition. This condition was sought to be imposed after the time for filing a claim of lien had expired if the account for prior items was to be deemed closed, but such time had not expired when these bricks were ordered. Both opinions concede that the brick company acted in good faith in filling the order and was unaware of any discontinuance and taking of possession as above stated. The brick company incurred demurrage and transportation expense and claimed this continued the account, and, at all events, that the last item was not of any brick furnished before this last shipment.

The majority opinion concedes the authority of the contractor to give the order, and that the furnishing thereof would have continued the lienable account, had this discontinuance not intervened. But it is said "it is not the purchasing of material which charges the building, but the furnishing thereof for it; and to be effective, this must be to the owner, or someone sustaining the relation of contractor to the owner. * * * Though so requested, the brick company declined to turn the car of brick over to the owners." It was held not material on what ground this refusal was based, because "such refusal amounted to an election that the brick should not be used."

The dissenting opinion said: "When the order was given and accepted by the brick company the contractor undoubtedly had authority to place the order so as to bind all parties in interest. This order was never countermanded and the brick were shipped in due season. * * * The reason why the brick company insisted upon this item going to the contractors, and why it should be treated as part of the account, is to save that part of the account for items furnished prior to the last shipment. It is not now seeking to enforce its lien for the last car of brick, for the reason that upon the return thereof it gave the contractor credit therefor upon amount." The prevailing opinion held that there was no lien preserved as to any part of the account.

This appears to us to be an extremely unjust decision. It cannot be said the brick company could have delivered the brick and charged the contractor therefor, because the brick company was told they could be delivered only to another debtor therefor. It could have been of no advantage to owners to insist that the brick be charged to them instead of the contractor as in any way affecting their final settlement with the contractor, unless they were insisting upon a lower price. The only purpose, therefore, would be the accomplishment of that which the court said was accomplished, viz.: releasing the building from an inchoate lien.

The insistence of the owners upon a repudiation of a contract rightfully entered into, the agreement to perform which was presumably upon the statutory security, when to carry it out would have been in fulfillment of their original contract, should have been regarded as an insistence not in good faith. The doctrine of *res inter alios acta* should have been applied to save what was a vested right in the brick company.

The principle of this decision makes it entirely possible for the grossest of fraud to be perpetrated and the beneficent purpose of a mechanics' lien statute entirely thwarted.

NOTES OF IMPORTANT DECISIONS.

CORPORATIONS.—ACCEPTANCE OF CONTRACT ILLEGALLY MADE AS BINDING ON BANKRUPT CORPORATION.—The facts in the case of *Woodruff v. Shimer*, Trustee in Bankruptcy, 174 Fed. 584, decided by Third Circuit Court of Appeals, shows that the acceptance of a contract by a corporation, which was not properly entered into, may be disputed by the trustee of the bankrupt corporation, and his contention prevail though the same evidence of ratification and acceptance by an individual would appear to be quite conclusive.

The facts show that one Baird was the owner of two iron furnaces at Roanoke, Va.; that he incorporated the Roanoke Iron Company under a New Jersey charter, transferring his business to it in consideration of the issuance to him of 4,969 of its 5,000 shares of stock, the remaining 31 shares being issued to four associates, who, with himself, constituted its board of directors.

Baird was made president and undertook to manage the entire business himself. He assigned a contract between himself and Woodruff to the corporation, the latter agreeing to hold him harmless on all the covenants and agreements therein, Baird signing the assignment individually and as president of the corporation, no corporate seal being affixed and no corporate action approving or ratifying the transaction.

Woodruff billed the ore he was to furnish under the contract to the Furnace Company; it received it, made statements of its weight and analyses to Woodruff and credited him on its books. Woodruff, claiming to be a creditor of the corporation, presented his claim to the referee, which being allowed was reversed by the district court. The upper court sustained the district court. This affirmance was by Gray and Buffington, C. JJ., and Young, D. J., the latter writing the opinion. No authorities are cited in the opinion, nor does it appear how long this course of dealing continued, but it was said: "True, the Roanoke Company got the ore and used it in its business; but there was no privity of contract between Woodruff and the Roanoke Furnace Company, and Woodruff must look to Baird for his money, and Baird may collect his money from the Roanoke Company."

If this corporation were a going concern it would look like it would be barred in setting up ultra vires, and it is not alleged that there was any over-reaching of any kind or any fraud intended or any collusion of any kind between Baird and Woodruff. It would at least seem that some principle of equity would control in this matter letting Woodruff in, if Baird is insolvent, especially if, he paying, Woodruff could put in a claim.

This decision appears to us opposed to cases which place the trustee in bankruptcy in the shoes of the bankrupt, and because of a mere technicality in proper party to sue, to work out a very unjust distribution of assets. One may readily agree that the assignment was not valid unless ratified, but was there not an estoppel in favor of Woodruff operative against the trustee as effectually as it could have operated against the corporation as a solvent concern?

CARRIERS OF PASSENGERS—DISTINCTION BETWEEN THOSE BY LAND AND SEA AS TO RIGHT TO REFUSE TO RECEIVE.—The case of *Connors v. Cunard S. S. Co.* (Mass.), 90 N. E. 601, shows that plaintiff's intestate and her sister purchased tickets for second-class fares from Boston to Queenstown and were taken on board. After they went on board it was ascertained that plaintiff's intestate was suffering with a serious disease, as shown by a letter of her physician handed to the ship's surgeon, which showed, according to the latter, that "under the circumstances she was in no condition to travel without serious risk to her life."

They were removed from the ship and suit was brought.

The court goes into a very elaborate discussion of the question of the duty of common carriers as to acceptance of one presenting himself for transportation and paying the regular fare. It is stated that a positive limitation rests upon this rule arising out of the carrier's duty to care for and protect those who become passengers. This latter duty excuses from accepting as a passenger any insane person (*Owens v. R. Co.*, 119 Ga. 230, 63 L. R. A. 946; *Meyer v. R. Co.*, 54 Fed. 116, 4 C. C. A. 221), and one with infectious disease (*Paddock v. R. Co.*, 37 Fed. 841, 4 L. R. A. 231), or an intoxicated person or any other who may be offensive to other passengers, as to which there are cited a number of Massachusetts cases.

But the question in the principal case was whether the safety, convenience or comfort of other passengers was, practically, the only limitation upon the right to transportation by one paying the regular fare.

The passenger offered here had an internal disease, and a number of cases are cited to support the contention of the limitation being as above indicated. These are reviewed, one by one, in the opinion in the principal case, and it is argued that at most there are only general statements in the cases to this effect, and the point itself was not sub judice. Then the court cites a number of cases where refusal not based on duty to other passengers was held permissible, or there was plain inference that a refusal would have been justified, but the carrier having accepted a passenger, one requiring

more than the ordinary care, was entitled to demand it. The cases speak of "voluntary" acceptance. But the question being as to a passenger about to take a sea voyage it was concluded that the carrier was not bound to accept a passenger whose condition of illness was first disclosed after the ticket had been purchased, on her presenting herself on board the vessel.

It was said: "The question of accepting as a passenger a person in need of medical attention is a more serious one in case of a carrier by water than one by land. Hospitals abound on shore, and even where there are no hospitals physicians and surgeons could be found at different stopping places to whose care the traveler in need of medical attendance can be confided. But in case a person in need of medical attendance is taken on a sea voyage, she must be cared for until the voyage is at an end, and if she is not accompanied by her own physician it might well be held that the responsibility of caring for her had been assumed by the carrier."

This reasoning implies that any carrier may refuse to receive any passenger whose acceptance implies that something more, in a substantial sense, is looked for than ordinary transportation. If an additional burden, of a substantial sort, would reasonably be expected to follow acceptance of the passenger, it would appear the carrier's refusal to accept would be justifiable.

CORPORATIONS — STATUTES AS TO TRANSFER OF STOCK AFFECTING VESTED RIGHTS OF SHAREHOLDERS.—It was claimed in *Hensley v. Myers, receiver*, 30 Sup. Ct. 148, by subscribers to the capital stock of a corporation that a later statute requiring that stock should only be transferred on the books of the corporation under certain conditions not before existing, impaired the obligation of their contract right to dispose of said stock, and therefore they had ceased to be shareholders by a transfer in accordance with the law as it was when they became stockholders. This defense was made to action by the receiver of an insolvent corporation upon stockholders to an amount to their stock, together with what was unpaid on the stock, respectively. The defense was that the subscribers had ceased to be stockholders, their sale of stock being subsequent to the later transfer statute, which also provided for procedure in respect to such liability.

Mr. Justice Harlan, speaking for the entire court, said: "It was never contemplated by the framers of the constitution that the national authorities should supervise the action of a state upon such a subject, so long as the state did not transgress that instrument, but kept within the limits of its reserved power to enact

such reasonable regulations as, in its judgment, were necessary or conducive to the general good." These new conditions were that the transfers should appear on the books of the secretary of state. They were held to be within the reserved power of a state, as they did not attempt to increase liability nor operate to forbid as full right to sell as formerly existed. So far as change in procedure was concerned, the rule was applied of there being no vested right in procedure.

MARRIAGE AND DIVORCE—CONFLICT OF RULING AS TO CUSTODY OF CHILDREN.—The case of *Dixon v. Dixon*, 74 Atl. 995, exhibits a very interesting complication predicated on the faith and credit clause of the federal constitution. It appears that a wife residing in New Jersey and husband living in New York, brought a proceeding in the former state for the custody of their children, and they were awarded her. By a modification obtained by the husband, the children were to be with him certain months of the year, and with the mother the remaining time. The wife removed to Maine, and it was while she was there the modification was made, and acquiesced in, and obeyed until divorce proceedings were instituted in Maine. It was ruled that the order continued in force while the wife resided in Maine. But the Maine court, in the divorce suit, awarded the wife sole custody of the children. The question then arose in New Jersey as to whether or not, though the New Jersey order is entitled, as the New Jersey court holds, to full faith and credit under the federal constitution, whether it has been superseded by the order of the Maine court in the divorce action. The order in the divorce suit was interlocutory only, and this order was only for custody during pendency of the suit, and it recites that the husband had been duly served. The New Jersey court is now asked to punish the wife for a threatened disobedience of its order, and this is denied with an intimation that if she actually disobeys it she will be punished. The New Jersey court gets at the matter somewhat singularly. It discusses the insufficiency of the petition in the Maine court to support the judgment or order made by it, and it appears to be on this line that enforcement of the New Jersey order is held by the New Jersey court to be proper. The opinion says: "The allegation that she had filed a libel, while it showed a change in her relations with her husband, did not show a change in the relations of that husband to the children." But it may be asked was not the Maine court the proper court to judge of that, and not the New Jersey court? These children were in Maine, and if the Maine policy, interpreted by

its judges, said there was worked by a suit for divorce being begun a change that affected the children, what right had the New Jersey court to say this is not true?

But there is pointed out in the opinion another very singular thing, having its relation back to the Haddock case, decided by the federal Supreme Court, and which startled the country on the subject of jurisdiction in divorce matters. This service spoken of by the Maine court was not personal service in Maine. The singularity we speak of is thus alluded to in the opinion by the New Jersey court: "The case presents a somewhat singular situation. Mr. Dixon is domiciled in New York. By the law of that state he may, in so far as the proceeding is a divorce proceeding, disregard notice served on him in New York. The Maine decree will not in New York be treated as severing the marriage bond."

Now, here is the case: The decree and interlocutory orders therein are void in New York. The husband relies on his rights under the New Jersey order, and New Jersey court says the Maine court has rendered no judgment with pleadings to support it. Suppose Maine ruling is that New Jersey is wrong about this? Would New Jersey have the right to adhere to its view?

THE HISTORICAL INTERPRETATION OF "FREEDOM OF SPEECH AND OF THE PRESS."—PART I.—GENERAL CONSIDERATIONS.*

The purpose is to re-interpret our constitutional guarantees for an unabridged freedom of speech and of the press, by the historical or scientific method, and with special reference to the specific issue raised by the judicial dogmatism thereon and my different conception of how that phrase ought to be interpreted. To clarify the issues I restate these contradictory propositions, so the reader may have them constantly in mind during the following discussion.

My contention as to the meaning of a constitutionally guaranteed right to unabridged freedom of speech and of the press is this: No matter upon what subject, nor how injurious to the public welfare any particular idea thereon may be deemed to be the constitutional right is violated, when-

* This article will be continued in the two next successive issues of this Journal.

ever anyone is not legally free to express any such or other sentiments, either:

First, because prevented in advance by a legally created censorship, or monopoly in the use of the press, or by other governmental power; or,

Second, because in the effort to secure publicity for any idea whatever, the equality of natural opportunity is destroyed, in that some, by subsequent legal penalties or other legal limitations, are deterred, or are impeded, in the use of the ordinary and natural method of reaching the public, on the same legal terms, as these are permitted to any person for the presentation of any other idea; or,

Third, because the natural opportunity of all is abridged, by some statutory impediment, such as taxes upon the dissemination of information, placed upon all intellectual intercourse, as such, or all of a particular class; or,

Fourth, because inequalities in state-created, or state-supported opportunity is legalized, so that in the effort to secure publicity for any sentiments and merely because of their nature, literary style, or supposed evil tendency, either by law, or for any cause by any arbitrary exercise of official discretion, one is discriminated against in the use of state-created or state-supported facilities for doing so; or,

Fifth, because after expressing one's sentiments one is by law liable to punishment, merely for having uttered disapproved thoughts:

Provided always, that the prohibition, abridgement, discrimination, subsequent punishment, or other legal disability or disadvantage, is arbitrarily inflicted, or attaches merely because of the character, literary style, or supposed bad tendency of the offending sentiments, or their spread among some adults, willing to read, see, or hear them, or is the result of arbitrary official discretion, and that they do not attach because of any inseparably accompanying or other resultant penalized invasive act, constituting an actually ascertained, resultant, material injury, (as distinguished

from mere speculative or constructive harm) inflicted, or by overt act attempted to be inflicted, before arrest and punishment, and in either case actually resulting from the particular utterance involved.

But, if the injury is to reputation, or loss of public esteem and among the consequences is material injury to the libeled person, even then, truth and justifiable motive must be always recognized by law as a complete defense, and where the resultant injury consists in violence to person or property, *actually attempted* or achieved, then the *intent* to achieve such results must be of the essence of the crime, and punishment of a *mere* speaker must only be as for an accessory before the fact, if our constitutional guaranty is to be made effective. I do not discuss civil remedies.

The Judicial Interpretation.—The contrary conclusion of the courts is well summarized by a dictum, perhaps hastily uttered, of the federal Supreme Court. These are its words: "The main purpose of such constitutional provisions is to prevent all such *previous* restraints as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare!"¹

In England the licensing acts, which put a *previous* restraint upon publications, existed for only a short time, and finally expired in A. D. 1694.² It seems therefore, according to the definition of our American courts, that perfect *unabridged* liberty of speech and press obtained in England after the year 1694, because no licensor prohibited before utterance, and there prevailed a system of subsequent punishment, for only such opinions as were deemed contrary to the public welfare, and for nearly a century preceding our Revolution the agitation for larger freedom of speech and of the press, was a vain demand for something already enjoyed by the agitators, but not known to them to exist.

(1) Patterson v. Colo., 205 U. S. 454 (482).

(2) Stevens' Sources of the Constitution of the U. S., p. 221; Patterson's Liberty of Press and Speech, 50 and 51.

However ridiculous such judicial implications will appear to some, the official eminence of the many judges who have sanctioned that doctrine, and especially the tremendous consequence of it to our liberties, precludes levity. We will therefore proceed in all seriousness to demonstrate the error of our courts by a historical study and a scientific interpretation of the facts. Thus it will be made to appear that unabridged liberty of discussion did not obtain in England, or its American colonies, from 1694 until the American Revolution, and that our constitutions were designed to change the prevailing system of an abridged and *abridgable liberty of discussion by permission*, to an unabridged and *unabridgable liberty of discussion as a constitutionally guaranteed, natural right*, not to be ignored, as in England, or Russia, where the claim of such freedom was and is denied, on the plea of furthering the public welfare.

The Early Theory as to Free Speech.—In England, "before public meetings were resorted to as an ordinary exercise of self-government, great looseness prevailed in the law, the theory apparently being, that free speech was a species of gift by the Sovereign to the people."³ To have the power to control what others may hear or see, is of course to that extent a limitation upon their right to acquire and have opinions—thus abridging the liberty of conscience—since one cannot well acquire opinions the materials of which are withheld from him. Since the right to have a personal judgment and the right to express it, existed only as a gift from kings and priests, when the issuing of pamphlets became an extended form of speech, nothing was more natural than that at first "printing was treated like the making of salamonic and apprentices were cautioned not to lay open the principles to the unfaithful."⁴

The reasons underlying such conclusions are fully appreciated only by keeping in

(3) Patterson's *Liberty of Press*, p. 19.

(4) Patterson's *Liberty of Press*, p. 43, citing *Becket v. Denison*, 17 Parl. Hist. 958.

mind the English conception of that period as to the nature of the state. The features especially to be remembered are the union of church and state, the King's rule of divine right, as vice-regent for the Almighty, exercising the divinity's political omnipotence, and thus being the giver of all good, including the grant of commercial opportunity and monopoly and being incapable of doing any wrong. It necessarily followed from such premises that the state religion be declared the fundamental and controlling part of the laws of England, so that any statute made against "any point of the Christian religion, or what they thought was the Christian religion, was void."⁵

From such considerations there grew up naturally laws against blasphemous and seditious utterances. That these found the tap-root of their justification in the union of church and state is evident from such judicial unreason as the following: "To say that religion is a cheat is to dissolve all those obligations whereby civil societies are preserved, and Christianity being part and parcel of the laws of England, therefore to reproach the Christian religion is to speak in subversion of the law."⁶ This doctrine no longer obtains in England.⁷

Since man can impose no rightful limitations on the exercise of power by those who rule by divine right, it follows that under such a state all liberty is necessarily only liberty by permission, never liberty as an admitted natural right, and necessarily to decry religion was to inculcate treason against those whose right to rule was founded in that religion, and to attack a government conducted by divine right was in its turn irreligious and blasphemous. So then admitting the premises of their church-state, the Star Chamber was quite logical when in *de famosis libellis* the court assumed "that words against the government amount

(5) Patterson's *Liberty of Press and Speech*, p. 67, citing 10 St. Tr. 375.

(6) *Reg. v. Taylor, Ventris*, 293.

(7) See *Blasphemy and Blasphemous Libel*, by Sir Fitz James Stephens, *Fortnightly Review*, Mar., 1884.

to sedition; and that words against an archbishop are words against the government."⁸

Necessarily under such a state, those who opposed the existing restrictions upon speech and press, were promoting irreligion, and therefore treason against both earthly and heavenly governments. In that controversy, the demand for unabridged, or even a larger freedom of heretical religions, utterance, necessarily included a demand for the right to advocate even treason, and of course logically must include all the lesser crimes. Although in America we boast of having outgrown at least the avowed union of church and state, we still retain that union in fact, by virtue of many repressive laws which have no other foundation than the precedents of a church-state, and the moral sentimentalizing associated with, or anchored in religion. In studying the English precedents we must always bear in mind the before-mentioned essential differences in our theories of government and the resultant differences between liberty merely by permission and liberty as a constitutionally guaranteed natural right.

On Constitutional Design.—Our constitutional guarantees upon this subject are both useless and meaningless, except on the assumption they were designed to repudiate the old theory that freedom of utterance was liberty by permission or grant, and were intended to establish intellectual liberty as a matter of constitutionally guaranteed unabridgable natural right.

If it was not the design to change the English system of *liberty by permission*, to one of *liberty as a right*, then there was no reason for any constitutional provision upon the subject. If the *only* purpose was to preclude the creation of an official censor, the easiest way would have been to have had the constitution say, "No censor shall ever be appointed," or "no previous restraints shall be put upon speech or press." Thus there would be no restriction upon other modes of abridging freedom of utterance. If the intention had been that a power

should remain, by subsequent punishment to suppress these discussions and ideas which were deemed contrary to the public welfare, then again there was no need for any constitutional provision upon the subject, because no other opinions than such as had been deemed contrary to the public welfare ever had been anywhere suppressed. If it is possible to assume that the purpose of amending our federal constitution was to preclude congress from punishing men for publishing ideas, believed by it to be *conducive to welfare*, then we might still expect that the most appropriate language would have been used. Then our constitution might have read thus: "Congress shall make no law abridging freedom of speech or of the press, *except* in the interest of the public welfare." But the insistence here is that such exception cannot properly be interpolated into our constitution by judicial action.

I utterly repudiate the dogmatic paradox of our courts which, while claiming to construe our constitutions, declare that the words "the legislature shall make *no laws* abridging" etc., mean that, in the alleged interest of the public welfare it may *enact any abridging laws* it sees fit, if thereby no restraint is imposed prior to publication.

It does seem to me that these few suggestions, together with a bit of critical thought on the words themselves, as used in our constitutions, should be all that is necessary in justification of my contention. However, the abundance of judicial dogmatism to the contrary, and the general acquiescence therein, persuades me that a more elaborate study of the historical factors is quite indispensable for most minds, even of the sort that have capacity for logical thinking upon this subject.

The Method Outlined.—In the scientific aspect, our social and political institutions, like all natural phenomena, are but special manifestations of the all-pervading law of evolution. With enlarged experiences we change our conceptions of what is required by the natural law of our social relations, and accordingly we change our verbal

statements of law. It follows that the laws of a state always seem to be approaching, but never attain perfection. This seemingly corresponds to the reality so long as the dominant conception of the law is nearing the truly scientific. By a scientific conception of the law I mean one wherein the empirical generalizations have all been included in one rational generalization, which is *the law upon* the subject, because it is derived wholly from the nature of things, and in every state of facts to which it can be applied it conclusively determines the *how* and the *why* certain judgments must be so and thus, the result always being derived exclusively by deductions from the ultimate rational generalization, which thus furnishes the only standard of judgment determining the decision in every particular case, which *law* must always be conformed to, irrespective of the direct estimate of the beneficence of its results in any particular instance.⁹

I venture the assertion that no one who had understandingly read the foregoing statement of the meaning of "*Law*" and who has also read the judicial opinions as to the meaning of unabridged freedom of speech and of the press, will claim that any American court has ever attempted to declare *the law* of our constitutions as to freedom of utterance, because *no court* has ever attempted, even in a crude way, to furnish us with any comprehensive statement of the criteria for judging the constitutionality of enactments relating to speech or press.

In England, where there is no constitutional limitation upon the power of Parliament to abridge freedom of utterance, it was said, after the passage of the Fox libel act, that "Freedom of discussion is little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."¹⁰ That is freedom as a matter of expediency and by permission, the only kind of freedom of speech and press that

has ever obtained in England or Russia. How useless, then, is our constitution if, as the courts quite uniformly assert, unabridged and unabridgable freedom of discussion is the right to say whatever a legislature of mediocre attainments, may think it expedient to permit to be said? If our constitutional guarantees declare and determine *rights*, then these cannot be destroyed by the arbitrary decree of the legislature, even though done in the alleged interest of the public welfare. If the Constitution is a *law of right*, then its declarations are to be always obeyed, even though the legislature and court concur in the belief that in a particular case the exercise of a constitutional right is against the public welfare. Neither can such belief invest them with the authority to amend the constitution so as to make it read "Congress shall make no law abridging freedom of speech or of the press, *except* as to those ideas which it deems contrary to the public welfare." If we are to preclude such dogmatic judicial amendments of our constitutions, we must develop in the judicial mind a conception of constitutional law by the scientific method, and in accord with the conception of the legal scientist.

The materials for a scientific interpretation of the constitution are the antecedent historical controversies, whose issues the constitution was intended to decide. The method must be to trace the evolution of the idea of unabridged freedom of discussion, from its inception as a mere personal protest and mere wish of the individual to be personally free from a particular interference, through innumerable empirical inductions to the impersonal recognition of a general principle underlying all such protests and demands, and determining the rightfulness of them. To achieve this we must study the historical controversies and the primitive crude demands for a lesser abridgement of intellectual liberty, to discover the common element in all these varying demands, and when we have thus discovered the elements of unification common to all these struggles for a lesser abridgement of intellectual liberty, and by study-

(9) See 42 Am. Law Review, 380.

(10) Dicey, The Law of the Constitution, p. 284.

ing the various historical means of abridgement from which arose the controversies which were settled by our constitutions, and by generalizing the inhibition against *all* similar recurrences, we may achieve a scientific conception of what is meant by an abridgement of freedom of speech. This will be a rational generalization giving us the criteria by which to judge whether or not a particular enactment is, or is not, a breach of the constitutional right for an unabridged freedom of utterance.

The Disputants Classified.—I cannot resist the feeling that it is an awful reflection upon the general and the judicial "intelligence" that any argument should be deemed necessary to show the absurdity of the official "construction" of our constitutions. Manifestly it is urgently necessary, and it is to this end that we are to make a more precise analysis of the historical controversy which, in America, culminated in the adoption of our constitutional guarantees for *unabridged* freedom of speech and of the press. In making our analysis of the historical contentions we must keep in mind at least three main classes of disputants.

The first and most popular class consisted of those eminently respectable and official persons who asserted, not only the existence of a proper governmental authority to abridge in every manner the intellectual liberty of the citizen, but who also defended every existing method by which the power was being exercised. This class was the only one represented by official justifications and judicial definitions of the pre-revolutionary period.

To the second class belonged those conservative reformers, who did not question the existence of a power to control legally the intellectual food supply of the populace, but who did question some particular manner of its exercise. These usually believed in a larger liberty of speech and press, but

did not demand that it be wholly *unabridged*, and usually their arguments were directed only to the inexpediency of some particular abridgement and not toward the defense of liberty as an unabridgable natural right. Among these could be found persons who demanded larger liberty for the promotion of their own heresies, but justified the punishment of other heretics; there were those who demanded liberty for the discussion of religion, but hastened to out-Herod Herod in their justification of the punishment of the psychologic crime of verbal treason. Others, like Erskine, demanded a larger liberty for the criticism of government, but hastened to give assurance of their entire orthodoxy by joining in the clamor for the punishment of religious heretics. Should we mistake any of these disputants as the defenders of *unabridged* freedom of speech and press, and adopt their definitions of liberty, as a means of constitutional construction, we would, of course, be led far astray and reduce our constitutional right to unabridged freedom to a limited liberty by permission.

The third class of controversialists was composed of those few who denied the existence of any rightful authority for the punishment of any mere psychologic crimes and who therefore demanded the establishment and maintenance of *unabridged* liberty of utterance. It was the contention of these persons which was adopted into our constitutions, and it is their statements of the meaning of "freedom of the speech" which should be made the basis for constitutional construction, and not the judicial precedents of the Star Chamber, expressing the English practice from the viewpoint of the church-state, which viewpoint was repudiated by our American states, and which precedents were overruled by our American constitution. Unfortunately these precedents are still often followed by our American courts, whose judges are supposed to be the conservators, but often act as the destroyers of our liberty, especially when unpopular and disapproved utterances are involved.

THEODORE SCHROEDER.
New York City.

PROCESS—EXEMPTION FROM SERVICE OF.

THE NETROGRAPH MANUFACTURING COMPANY v. GEORGE R. SCRUGHAM.

New York Court of Appeals, January 28, 1910.

A non-resident who comes into this state voluntarily and while here is arrested and released on bail may, when he returns for trial and for no other purpose, be served with a summons in a civil action having no relation to the criminal charge. The reason of the rule exempting persons in attendance upon the courts from service of civil process, which is to encourage voluntary attendance and to expedite the administration of justice, does not apply to such a case. A person charged with a crime and who is at large on bail is constructively in the custody of the law and cannot be said, when returning for trial, to act voluntarily.

WERNER, J.: The defendant, a resident of the state of Ohio, came into this state voluntarily in April, 1907. While here he attended a legislative hearing in the City of Albany. At that time he was arrested on a warrant, issued by a magistrate in the City of New York, charging him with the crime of conspiracy. He was taken to the City of New York, where he gave bail for his appearance pending the examination. The examination resulted in his being held, and he subsequently gave bail to appear and answer the charge in whatever court it might be prosecuted. In June, 1907, an indictment was found against him for conspiracy, and again he gave bail for his appearance at the trial. He returned to Ohio, and when the indictment was brought on for trial in the Court of General Sessions in the City of New York in March, 1909, he appeared and submitted himself to the jurisdiction of the court. His only purpose in coming into this state was to attend his trial upon the charge of conspiracy. A number of days were occupied in the trial, which resulted in the defendant's acquittal late in the afternoon of March 26, 1909. He remained in the City of New York until the following day, partly because he could not get a sleeping car berth on any train leaving the city on the night of his acquittal, and partly for the purpose of consulting his counsel about other indictments against him which had not yet been moved for trial. At about 9 o'clock of the day after the defendant's acquittal he was served at his hotel with the summons and complaint in this action. There is no connection between the criminal charge upon which the defendant was tried and acquitted and this civil suit for goods sold and delivered, which, for ought that appears, is brought in good faith. The learned court at special term held, and we shall assume, that

defendant's stay in New York after his acquittal was for a proper purpose, and not unreasonable in duration. These are the circumstances which give rise to this controversy in which the learned Appellate Division has certified to us the question: "Is the service of the summons and complaint upon the defendant * * * George R. Scrugham lawful?"

This question, based upon the undisputed facts of this record, is very narrow, but it relates to a subject which has for centuries engaged the attention of common law courts under every conceivable variety of circumstances. Volumes of opinions have been written in which one can find all sorts of conflicting decisions and almost any dictum that one may be looking for. The ease with which the writer of an opinion upon even the simplest phase of this subject could drift into a general dissertation upon it is nicely illustrated in the voluminous note to *Mullin v. Sanborn* (a Maryland case reported in 25 L. R. A. 721), where the industrious author has gathered the cases from almost every state in the Union, and from England. For present purposes, it is enough to say that from the earliest times it has been the policy of the common law that witnesses should be produced for oral examination, and that parties should have full opportunity to be present and heard when their cases were tried. It is in furtherance of that policy and the due administration of justice that suitors and witnesses from abroad are privileged from liability to other criminal and civil prosecution, eundo, morando, et reduendo. Year Book, 13 Henry IV., I. B. Viner's Abr. "Privilege." It is not a natural right, but a privilege which has its origin in the necessity for protecting courts from interruption and delay and witnesses or parties from the temptation to disobey the process of the courts. "It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice." *Parker v. Marco*, 136 N. Y. 585, 589, citing *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568. It is not only not a natural right, but it is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him. The privilege should, therefore, not be extended beyond the reason of the rule upon which it is founded. Since the obvious reason of the rule is to encourage voluntary attendance upon courts

and to expedite the administration of justice, that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law. Such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise. That seems to be the basis for the exception to the general rule of privilege which is illustrated in cases where persons are brought into the jurisdiction of a court under extradition from other states or foreign countries. *Williams v. Bacon*, 10 Wend. 636; *Slade v. Joseph*, 5 Daly, 187; *Adriance v. Lagrave*, 59 N. Y. 110; *People ex rel. Post v. Cross*, 135 N. Y. 536. The privilege is held not to exist in such cases. From time immemorial it has been the law that persons actually in custody under criminal process are not exempt from service of process in civil suits. 1 Chitty's Cr. L. 661; *Foster Cr. L.* 61, 62; *Tidd's Pr.* 306; 2 Archb. *Pr.* 122.

This brings us to the concrete question whether there is any difference, so far as this question of privilege is concerned, between a person actually in custody and one who is at large under bail. The question is not free from difficulty, but we incline to the view that a person who is charged with or convicted of crime and is at large on bail is constructively in the custody of the law. He is not in actual confinement, it is true, but he is in the custody of his bondsmen, who, by giving bail for him, have been constituted his jailors. "When bail is given, the principal is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so they may seize him and deliver him up in their discharge, and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state, may arrest him on the Sabbath, and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner." *Taylor v. Tainter*, 83 U. S. 366, 371. See, also, *Reese v. U. S.*, 76 U. S. 13, 21. This concise and authoritative exposition of the law of bail leaves little to be said as to the statute of a principal under a criminal bail bond. For many of the practical affairs of life he is as much at liberty as though he were not charged with crime. For the purpose of answering the charge, however, he is constructively in the custody of the law. His bailors have the right and power at any moment to become his jailors for the purpose of placing him in actual confinement. Under

such circumstances he cannot be said to be free to come or go at will, and when he submits himself to the directions of the courts having cognizance of the charge against him, he does not act voluntarily, but under compulsion of law. We are aware that this view is apparently at variance with some decisions in other jurisdictions, notably in England, but we think the administration of justice will be best served by keeping the rule of privilege within the reason upon which it rests. That reason fails unless the person claiming the privilege is a free moral agent who may come into or depart from the jurisdiction or not, as he pleases. Despite the just tendency of courts to extend the rule so far as possible, it must not be carried to the extent of wholly preventing creditors from pursuing their ordinary civil remedies against debtors, and particularly when the latter involve no restraint of the debtor's person. Much might be said as to the propriety or wisdom of permitting a person just released under bail to be at once arrested on other process, as appears from the English cases relied upon by the defendant, but that is not the question before us, and such a discussion could have no application to a case where a person at large on bail is served with a single summons which imposes no restraint whatever upon his person. His liberty is as great after service as it was before. He is just as free to depart from the jurisdiction as he was to enter it, and under such circumstances none of his rights are invaded.

The order of the Appellate Division should be affirmed, with costs, and the question certified to us answered in the affirmative.

Cullen, Ch.J.; Edward T. Bartlett, Vann, Willard Bartlett, Hiscock and Chase, JJ., concur.

Order affirmed.

NOTE.—Variant Decision on Liability to Civil Process in Attendance Upon Court.—The principal case states very fully the reasons for voluntary appearance in a jurisdiction in attendance upon court, but we have seen set forth nowhere else the precise point decided as to one attending court to save himself from arrest by his bail or in attendance to prevent its forfeiture. Whether such attendance is voluntary in its nature appears to us a close question. In *Moore v. Green*, 73 N. C. 394, 21 Am. Rep. 470, there was arrest on civil process immediately after the party had been discharged from arrest on criminal process by the giving of bail, the party being brought from one county to another. The opinion refers to a distinction between parties attending court prosecuting civil actions and those brought into court on criminal process and discharged from arrest thereunder. There is cited an English case, *Hare v. Hyde*, 16 Adol. and Ellis, 304, where there was an acquittal and discharge in the criminal matter and immediate service of him

on a *ca. sa.* Lord Campbell said "the cases show that an acquitted prisoner has no privilege *redeundo*; and it follows that while remaining a spectator he has no privilege more than any one else." Then the North Carolina court says: "This rule must apply to a prisoner not acquitted but discharged from arrest on bail." Then the North Carolina court goes on to discuss the distinction above alluded to, closing by saying that "whatever the reason may be, as the rule is apparently not unreasonable or oppressive, we feel bound to abide by the law as we find it to have been heretofore declared."

It is to be noticed here that the North Carolina case puts a release on bail on the same footing as a release on acquittal, which shows somewhat against the status of the party out on bail as defined in the quotation made by the principal case. That quotation carries the inference that if the party could not be served while under arrest he ought not to be served while out on bail, because he is constantly liable to arrest by his bail. His freedom is merely permissive at the will of his bail.

In *Byler v. Jones*, 22 Mo. App. 623, there was no question considered as to suitors or witnesses attending court voluntarily, but it was said the statute for service authorized such upon whomsoever was *lawfully* in the county and the court could "see no reason why one lawfully arrested in another county" could not be served in the county to which he was taken. It is said that "one under lawful arrest is not on that account exempted from service of civil process."

While the principal case proceeds upon the theory that the appearance in the state being compulsory the party was liable to civil process (voluntary appearance not making him so liable for reason stated) the fact of compulsion was seized upon in an old case for denying the effectiveness of the process. Thus the case spoke: "The real question is, was the defendant's presence within this jurisdiction in fact compulsory? I am of opinion that it should be so considered. * * * The defendant came from a foreign jurisdiction, where he resided, into this district for the sole purpose of pleading to the indictment and giving bail. His attendance was really compulsory, because he knew that, if he did not come without arrest, he would be brought here upon a warrant. Bail could not be taken in Massachusetts, and with knowledge of this fact he was of necessity advised that he must personally attend this court, either under or without arrest, and he chose to avail himself of the opportunity extended to him for a limited time to come without arrest. But, in fact, he was here none the less under compulsion * * * he was, while necessarily within the jurisdiction for that purpose exempt from liability to the service of process upon him in the present action." U. S. v. Bridgman, 24 Fed. Cas. No. 14,645, 9 Biss. 221, 223.

In Georgia the reasoning of the court was on the theory that voluntarily being in a state as a party to a suit was that which would make service valid while compulsory presence operated the other way. *King v. Phillips*, 70 Ga. 409. The facts of that case show a requisition by the Governor of Georgia on the Governor of Florida for defendant as a fugitive from justice and he set up that the verdict and judgment against him should be set aside because he was forced to re-

turn to Georgia to answer a criminal charge made against him. The motion was denied, the court speaking as follows: "That there was a requisition made for him appears by the executive warrant issued by the Governor of Florida for his arrest, and that he was arrested he himself testifies; but there is no return thereof made by the sheriff on the warrant and it does not appear that any other action was ever had thereon, or that he was ever under arrest or in the custody of any officer of the State of Georgia. So that there was no extradition of him in legal contemplation. * * * He was, if here not as a prisoner, or under compulsion as a fugitive from justice, liable to suit as others are."

This case seems to us squarely opposed to the principal case and running upon two squarely contradictory theories.

In extradition under treaties with foreign countries the rule has been laid down that the party extradited cannot be lawfully tried for any other offense, for he is "clothed with the right to exemption" in this regard until he has "an opportunity to return to the country from which he was taken, a national honor requiring good faith to be kept with the country concerning him." U. S. v. Rauscher, 119 U. S. 407. If the Georgia rule is true as to requisition between states, *a fortiori*, it would seem applicable as to extradition under treaties.

The rule and the theories upon which the principal case goes, seem, however, supported by the great weight of authority. But, as this is a rule wrought out for the more convenient, certain and unobstructed administration of justice, ought not the encouraging of bail-giving come within its purview?

Sureties on bail bonds ought *not*, if the giving of bail is preferred to incarceration and public expense and the working of injustice where acquittal finally results, to incur hazard from other directions. An innocent defendant might be made to become a fugitive, not because of the accusation against him, but for an entirely extraneous reason. We find no case exactly like the principal case and the door for giving reasons as to policy might be considered fairly wide open.

C.

JETSAM AND FLOTSAM.

PROFITS AND DIVIDENDS.

Where dividends are payable by a company on preference stock out of the profits for each year—that is, where the dividend is non-cumulative—the rule, of course, is that net profits only constitute the dividend-paying fund. But it may not always be easy to define "net profits" for this purpose, so as to know at what point precisely the gross receipts for the years are to cease being depleted in the interests of capital, and made available for dividends. Some difficulty has been caused by two apparently conflicting English decisions of Sir George Jessel—*Davison v. Gillies* (1879) and *Dent v. The London Tramways Company* (1880). In the former of these cases it was held that there were no net profits available for dividend, by reason of the necessity for expending the year's receipts in making good deterioration in the company's plant during several previous years. In the latter case it was held to be only necessary that the current year's wear and tear

should be provided for before dividends became payable. A few weeks ago Mr. Justice Eve had to decide, in England, in *Heslop v. The Paraguay Central Railway*, to what extent directors are entitled to carry forward profits before making them available for dividends. The trustees of a deed securing debenture stock asked for an injunction—substantially—restricting the company and its directors from setting aside the earnings of a particular year to provide for the future renewal from time to time of the company's plant and property until the interest on the debenture stock was paid. The whole question had been somewhat complicated by a balance of £22,000, being brought forward from the previous year to the year ending June 30, 1909, the net profits of which year by itself were £19,000, making £41,000, altogether. It was proposed to place £10,000, to reserve and carry forward £31,000. Mr. Justice Eve thought the £10,000 should be allocated between the two years, thus making the net profits for the 1909 year £19,000, less £5,000. (£14,000). By the order made—in lieu of an actual injunction—it was declared that the company were entitled to set aside so much of the £14,000, as in the opinion of the directors was required for the maintenance of the plaintiffs' security, that they were not entitled to carry forward anything more, and that the balance should be distributed among the debenture stockholders represented by the plaintiffs. As at present reported, it is not clear how the sum of £10,000 was arrived at; but if it is taken to represent two years' wear and tear of plant, it may be that nothing further would have to be deducted from the £14,000 for the safety of the plaintiffs' security, and that this sum will be immediately available for division as net profit.

—London Law Journal.

CONSPIRACY TO INDEMNIFY BAIL.

Rex v. Brindley, Porter, and Turnley (tried at Worcester, England, on October 25 and 26, 1909) was an indictment for conspiracy to prevent and defeat the due course of law and justice in a prosecution against one Clark for felony. The nature of the case will be sufficiently indicated by the questions left by Mr. Justice Jelf to the jury: (1) Was Brindley a party to an agreement with Clark that if Brindley and Porter would go bail for Clark in £50 each he would give them £50 each as security, so that Brindley and Porter should lose nothing if he absconded? (2) If so, was Brindley a party to such agreement with Clark with the intention that Clark should abscond? Substantially the same questions were submitted to the jury regarding the other two prisoners. The jury returned affirmative answers to both questions as against Brindley, but to the first one only against Porter, and negative answers to both as against Turnley.

Agreements to indemnify bail are undoubtedly so far illegal as to be unenforceable (*Herman v. Jeuchner*, 54 Law J. Rep. Q. B. 340; L. R. 15 Q. B. Div. 561; *The Consolidated Exploration Company v. Musgrave*, L. R. (1900) 1 Chanc. 37). But there have been judicial dicta in *Regina v. Broome*, 18 L. T. Rep. (o. s.) 19, and *Regina v. Stockwell*, 66 J. P. 376, against treating such agreements as criminal. The directions of Mr. Justice Jelf are welcome for their disregard of such dicta, and as laying down a salutary rule that agreements to indemnify bail may be evidence of a conspiracy to defeat justice.

The following comment in the New York Law Journal on this decision is apropos:

"If our courts and legislature held to the doctrine of this case it would diminish enormously the business of surety companies, end the occupation of the professional bardsman and even deter many people from giving bail for their friends when they knew they could not enforce a contract of indemnity, express or implied. But our ideas of what constitutes public policy and mischief, on this head at least, are the very opposite of those held by the English courts. We have the legislature creating corporations to give bail upon receiving security, and our courts enforce contracts and securities given as indemnity to bail."

BOOK REVIEWS.

CYCLOPEDIA OF LAW AND PROCEDURE, VOL 34.

This volume contains over eighteen hundred pages, running from Receivers to Sale Bill of. Its most important titles are such as Receivers, Recognizances, Recoupment, Set Off and Counter Claim, Reformation of Instruments, Release, Removal of Causes and Replevin. It is readily apparent that this volume is one of the most desirable in the entire series, the annotation of text being, as appears up to the standard this work established for itself. We might also include in the above list the article on Religious Societies, which displays much research along various lines, touching taxes, contracts, indebtedness, acquisition and disposal of property, pews, membership, church tribunals, dissolution, actions, etc., etc. This is the most exhaustive treatment of such a subject that has come to our attention. The binding is in buckram, and publication is by The American Law Book Company, New York.

HUMOR OF THE LAW.

Less than a hundred years ago, according to the Irish Law Times, a proclamation was made at the Market Cross of Inverary, Scotland, which warned off poachers in this mixed style: "Ta hoy! Te tither a-hoy! Ta hoy three times!!! an' ta hoy—whist! By command of his Majesty King George, and her Grace te Duke of Argyll:

"If anybody is found fishing about te loch, or below te loch, afore te loch, or ahint te loch, in te loch, or on te loch, aroun te loch, or about te loch, she's to be persecuted wi' three persecutions: first, she's to be burnt; syne, she's to be drowned; an' then to be hangt. An' if ever she comes back, she's to be persecuted wi' a far waur death. God save the King an' her Grace te Duke of Argyll."

"In Mayor Gaynor's early days on the bench," said a Brooklyn lawyer, "a prisoner's counsel said in the course of his speech:

"Medical witnesses will testify that my unfortunate client is suffering from kleptomania, and, your Honor, you know what that is."

"Yes," said Judge Gaynor, "I do. It is a disease the people pay me to cure."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. Account—Fiduciary Relations.—A joint venture is analogous to the partnership relation, so that an equitable action for an accounting will lie between the parties thereto because of the fiduciary relation.—*Hathaway v. Clendenning Co.*, 119 N. Y. Supp. 984.

2. Adverse Possession—Continuity of Possession.—Privity, showing continuity of adverse possession, may be established by a transfer of possession alone, without any conveyance or agreement.—*Oliver v. Williams*, Ala., 50 So. 937.

3. Animals—Regulation.—Act March 23, 1906, (Laws 1906, p. 466, c. 137), entitled "An act to regulate the racing of running horses and to establish a state racing commission, and prescribing its powers and duties," was intended to foster the industry of breeding thoroughbred horses.—*State Racing Commission v. Latonia Agricultural Ass'n*, Ky., 123 S. W. 681.

4. Appeal and Error—Harmless Error.—A misleading charge cannot be complained of on appeal, where its misleading effect could have been obviated by an explanatory charge, which was not requested.—*Green v. Southern States Lumber Co.*, Ala., 50 So. 917.

5. Assault and Battery—Nature of Act.—A man commits an assault and battery by laying his hands upon a woman intentionally. If the same is done without her consent and against her will.—*State v. Roby*, Vt., 74 Atl. 638.

6. Attorney and Client—Acting for More than One Party.—An attorney should devote his skill and diligence to his client's interest, and will not be permitted to act for the adverse party in the same suit; but this rule does not prevent him from acting for two parties whose interests are not hostile or conflicting.—*National Hollow Brake Beam Co. v. Bakewell*, Mo., 123 S. W. 561.

7. Bailment—Gratuitous Bailment.—The failure of a gratuitous bailee to produce the goods

when called for held evidence of negligence, casting on him the burden of proving the manner of the loss of the goods, or that he used due care in guarding them.—*Bean v. Ford*, 119 N. Y. Supp. 1074.

8. Bankruptcy—Homestead Rights.—Where a trustee in bankruptcy submits question of exemption to state court, the failure of the bankrupt to make a claim in his schedule will not waive his homestead right.—*Harrelson v. Webb*, La., 50 So. 833.

9. Banks and Banking—Misappropriation.—A bank held charged with notice that a check was an improper withdrawal of a corporation's funds so that, having collected the money, it was liable therefor to the corporation.—*Havana Cent. R. Co. v. Knickerbocker Trust Co.*, 119 N. Y. Supp. 1035.

10. Bills and Notes—Prima Facie Case.—In an action on a note against the maker, plaintiff's introduction of the note corresponding with the complaint established a prima facie case.—*Deleon v. Walter*, Ala., 50 So. 934.

11. Boundaries—Control of Monuments.—Both courses and distances of a boundary line must yield to well-known and fully identified objects called for in a line.—*Myrick v. Hembree's Adm'x*, Ky., 123 S. W. 668.

12. Brokers—Agreement for Compensation.—The undertaking by a broker to effect a sale of property is a consideration sufficient to support the contract for the payment of commissions therefor.—*T. M. Gilmore & Co. v. W. B. Samuels & Co.*, Ky., 123 S. W. 271.

13. Authority to Sell Land.—An authority to sell land may be revoked at any time before sale, and the owner will not thereby incur any obligation to the agent.—*Cronin v. American Securities Co.*, Ala., 50 So. 915.

14. Inconsistent Relations.—The rule prohibiting a real estate agent from recovering compensation for selling property, where he was agent of both buyer and seller, applies unless both parties know of his inconsistent relation and consent thereto.—*Green v. Southern States Lumber Co.*, Ala., 50 So. 917.

15. Burglary—Evidence.—Though the gist of burglary is the entry of a building with the intent to commit any of the crimes mentioned in Pen. Code, sec. 459, yet proof of a larceny or other felony committed in the building by the accused would be proper not only to show the intent, but also the fact of the entry.—*People v. Piner*, Cal., 105 Pac. 780.

16. Carriers—Carriage of Passengers.—A street car passenger carried by his station and directed to alight in a dark, strange place, has the right to assume that the place is safe, in the absence of directions how to reach his destination.—*Cossitt v. St. Louis & S. Ry. Co.*, Mo., 123 S. W. 569.

17. Destruction of Freight.—Where glass was totally destroyed in transportation, the measure of damages was its market value at destination and interest, with so much of the freight and hauling charges prepaid.—*Texas & P. Ry. Co. v. Hoffecker*, Tex., 123 S. W. 617.

18. Shipment of Goods.—The failure of a carrier to move a car load of lumber renders it liable for the loss of the lumber by its subsequent destruction by fire without the carrier's fault.—*Green v. Louisville & N. R. Co.*, Ala., 50 So. 937.

19. Charities—Liability for Negligence of Employee.—Because the mother of a child contributed to the expense of its care, an institution caring for it did not lose its charitable character so as to make it liable for the child's death, if due to the negligence of an experienced employee.—*Cunningham v. The Sheltering Arms*, 119 N. Y. Supp. 1033.

20. Constitutional Law—Act Regulating Barbering.—The Laws 1902, p. 101, c. 51, to regulate barbering, is not unconstitutional as class legislation because it is confined to barbers in first, second and third class cities.—*Commonwealth v. Ward*, Ky., 123 S. W. 673.

21. Delegation of Legislative Power.—Act March 23, 1906 (Laws 1906, p. 466, c. 137), regulating the racing of running horses, held, not unconstitutional as giving the state racing commission arbitrary power or devolving upon it the power of legislation.—*State Racing Com-*

mission v. Latonia Agricultural Ass'n, Ky., 123 S. W. 681.

22.—**Due Process of Law**.—Act March 21, 1798, (3 Smith's Laws, p. 320), declaring Conneaut Lake a highway for boats and rafts, held not to take private property, but merely to make use of a body of water which the state already held for the benefit of the public.—*Conneaut Lake Ice Co. v. Quigley*, Pa., 74 Atl. 648.

23.—**Regulation of Railroad Rates**.—Though the right of a railroad company to collect reasonable fares is a vested right, it is subject to the exercise of the police power of the state for the promotion of the public welfare, and the protection of the public and the carrier.—*Portland Ry. Light & Power Co. v. Railroad Commission of Oregon*, Or., 105 Pac. 709.

24. **Contempt**—**Probate Courts**.—Probate courts have, independent of statute, inherent power to punish for contempt persons who in open court refuse to comply with its lawful orders, or in any manner impede the orderly transaction of its business.—*Ex parte Hanson*, Kan., 105 Pac. 694.

25. **Contracts**—**Performance**.—Though plaintiff agreed to repair certain rooms to the satisfaction of defendant's agent, the agent could not arbitrarily reject the work as unsatisfactory.—*Marcus v. Nelson*, 119 N. Y. Supp. 1085.

26.—**Restraint of Trade**.—A contract not to engage in the manufacture of certain door-knobs for a period of five years held reasonable, and enforceable.—*Artistic Porcelain Co. v. Boch*, N. J., 74 Atl. 680.

27. **Convicts**—**Convict Labor**.—A convict, sentenced to hard labor for a specified number of days at 30 cents a day to pay costs, as provided by Code 1896, sec. 5426, held not entitled to recover from the county the difference between such rate and the rate paid by the convict contractor to the county under a contract executed pursuant to Code 1898, secs. 4520-4545.—*Bibb County v. Ward*, Ala., 50 So. 907.

28. **Corporations**—**Compliance With Statutory Requirement of Foreign State**.—A foreign corporation complying with the statute will not be deemed within a subsequent statute requiring foreign corporations to apply to a charter board for permission to do business in the state.—*State v. St. Louis & S. F. R. Co.*, Kan., 105 Pac. 685.

29.—**Ultra Vires**.—A note given by a corporation for stock in another corporation is ultra vires, and not collectible by the payee of the note.—*Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, Tenn., 123 S. W. 641.

30. **Courts**—**Jurisdiction**.—An action for the destruction of real property situated in one state, caused by negligent act committed in another state, may be brought in either state.—*Smith v. Southern Ry. Co.*, Ky., 123 S. W. 678.

31.—**Validity of Rule**.—The district court of the territory of Oklahoma held without power to impose a rule requiring a party appealing to the district court to deposit with the clerk of the district court a specified sum for clerk's costs.—*Stone v. Clogston*, Ok., 105 Pac. 642.

32. **Covenants**—**Incumbrance**.—Receiving a deed and paying purchase money with tenant in possession held an acceptance of constructive possession of the land, so that the tenant's possession was not a breach of the covenant against incumbrance.—*Kneib v. Beardsley*, Mo., 123 S. W. 546.

33.—**Restrictive Building Covenants**.—A common grantor, who has parted with his title to a portion of the land for the benefit of which a restrictive covenant has been imposed on other land, theretofore conveyed by him, may not thereafter release or modify the covenant so far as it operated to benefit the land previously conveyed.—*Bowen v. Smith*, N. J., 74 Atl. 675.

34. **Criminal Law**—**Reception of Evidence**.—The state cannot be forced to introduce any particular witness in the proof of its case, at least where he is a co-conspirator of accused in a murder case, though he were an eyewitness.—*Goode v. State*, Tex., 123 S. W. 597.

35. **Criminal Trial**—**Several Pleas**.—Under Laws 1907, p. 33, c. 30, sec. 2, providing that a plea of insanity may be entered "in addition

to the plea or pleas required or permitted by other laws than this," such a plea is severable from others entered, so that its withdrawal would not affect other pleas.—*State v. Quinn*, Wash., 105 Pac. 818.

36. **Damages**—**Personal Injuries**.—A petition, by alleging "internal injuries," held to authorize recovery for injury to the bladder.—*Ft. Worth & D. C. Ry. Co. v. Morrison*, Tex., 123 S. W. 631.

37. **Elections**—**Ballots**.—A blotch of ink on a ballot, attributable to other causes as readily as to design, held not a distinguishing mark.—*Bass v. Leavitt*, Cal., 105 Pac. 771.

38. **Eminent Domain**—**Injury to Land Adjoining Right of Way**.—A railroad company held liable for the use of adjoining land for wagon ways in hauling to and from the right of way in preparation and construction of the road.—*Hard v. Holston River R. Co.*, Tenn., 123 S. W. 637.

39. **Estoppel**—**Admissions**.—In a suit by a divorced wife for a partition of land, held, that she could not avail herself of admissions by the husband in his answer in the divorce suit.—*Wingard v. Wingard*, Wash., 105 Pac. 834.

40.—**Dower**.—Though a widow had never conveyed her dower by a deed in the statutory manner, she was estopped to make any claim thereto after disclaiming any right thereto by proper pleading in a case.—*Myrick v. Hembree's Adm'x*, Ky., 123 S. W. 668.

41. **Evidence**—**Declarations of Agent**.—Statements of the owner's architect, made while he was inspecting the building, in order to advise the owner whether it had been constructed according to agreement, were binding upon the owner, and admissible in evidence in an action by the contractors for the contract price.—*Fleming v. Lansford*, Ala., 50 So. 921.

42.—**Relevancy**.—A party cannot be permitted to corroborate himself by proving what he said or did at another time as the maxim, "Res inter alios acta alteria nocere non debet," is a law of evidence.—*Hamburg Bank v. George & Butler*, Ark., 123 S. W. 654.

43. **Exchange of Property**—**Personal Property**.—A horse sold to defendant by S. on a conditional sale held to have been subsequently traded by defendant to S., within a contract by which plaintiff was to be paid for services on defendant trading the horse.—*Snyder v. Slatton*, Ark., 123 S. W. 649.

44. **Executors and Administrators**—**Debts as Charge Upon Land**.—Debts, to be a charge upon the lands of an intestate, must have been incurred by the decedent, and be in excess of the value of his personal property.—*Mayer v. Kornegay*, Ala., 50 So. 880.

45.—**Loaning Money**.—An administrator not authorized to loan moneys of the estate, except on call, held only liable for such interest as he received in the exercise of due diligence.—*Pennebaker v. Williams*, Ky., 123 S. W. 672.

46. **Explosives**—**Blasting on Railroad Right of Way**.—A railroad company, though not liable for casting rock on adjoining land in blasting operations on its right of way, was bound to remove the rock within the shortest time in which it could be done, and with the least injury to the land, and was liable for failure to do so.—*Hard v. Holston River R. Co.*, Tenn., 123 S. W. 637.

47.—**Negligence**.—Since mere possession of dynamite for a lawful purpose is not unlawful or negligent, the burden is upon one injured by an explosion to show negligence causing the explosion or circumstances which would justify an inference of negligence.—*O'Brien v. Corra-Rock Island Mining Co.*, Mont., 105 Pac. 724.

48. **Fences**—**Expense of Erection**.—Moving party in proceedings for apportionment of expenses of partition fence held not required to consult other party as to the kind of fence to be built, etc. (Code 1907, secs. 4247, 4248).—*Johnson v. Frederick*, Ala., 50 So. 910.

49. **Fire Insurance**—**Subrogation**.—An insurance company, on paying insured for property tortiously destroyed by a third person, is subrogated to the rights of insured against the third person.—*Southern Ry. Co. v. Stonewall Ins. Co.*, Ala., 50 So. 940.

50. Frauds, Statute of—Leases.—Occupancy by a lessee under a lease unenforceable under the statute of frauds creating a tenancy whose termination is fixed by law, in determining the other terms of the tenancy including the time for payment of rent, the agreement between the parties might be resorted to.—*Boardman Realty Co. v. Carlin*, Conn., 74 Atl. 682.

51. Fraudulent Conveyances—Action to Set Aside Conveyance.—It is immaterial, in an action to set aside a conveyance by a debtor of his property to his wife, what consideration was paid by the complainant for the debt which he holds, as he stands in the place of the assignor.—*Allen v. Pierce*, Ala., 50 So. 924.

52. Gifts—Inter Vivos.—The conveyance of land without consideration by a father to his son, reserving possession and control by an oral agreement, does not constitute a gift inter vivos.—*Hall v. Hall*, N. J., 74 Atl. 651.

53. Habeas Corpus—Questions Raised.—An application for a writ of habeas corpus, on the ground that the proceedings under which a person was committed to an insane asylum were irregular, does not raise the question whether he has recovered his sanity, and is therefore entitled to be restored to competency.—*Ex parte Lewis*, Cal., 105 Pac. 774.

54. Homicide—Defense of Property.—In a homicide case, in which accused claimed that the killing was done to prevent a theft which he believed was about to be committed in the night time, evidence held to support a conviction.—*Joy v. State*, Tex., 123 S. W. 584.

55. Husband and Wife—Gifts.—When a husband builds a store on premises owned by him and his wife as co-tenants, the presumption of a gift to her does not arise as matter of law.—*Brady v. Brady*, Conn., 74 Atl. 684.

56.—Wife's Separate Estate.—Under Code 1907, sec. 4497, a mortgage on a wife's separate estate to secure the debt of her husband held void.—*Allen v. Pierce*, Ala., 50 So. 924.

57. Infants—Avoidance of Contract.—In an action for breach of warranty of a horse, based on an outstanding mortgage which plaintiff paid, the defense that the mortgage was avoided by an infant mortgagor, not being specially pleaded, is not available.—*Sanders v. Williams*, Ala., 50 So. 893.

58. Injunction—Adequate Remedy at Law.—A court of equity will not enjoin threatened criminal proceedings under a statute enacted in the exercise of the police power, though it is charged that the statute is invalid, and that a multiplicity of actions will injure and destroy civil and property rights, and that the damages resulting will be irreparable.—*J. W. Kelly & Co. v. Conner*, Tenn., 123 S. W. 622.

59. Intoxicating Liquors—Police Power.—Act Jan. 20, 1909, prohibiting the sale of intoxicating liquors within four miles of any schoolhouse, held enacted in the exercise of the police power.—*J. W. Kelly & Co. v. Conner*, Tenn., 123 S. W. 622.

60. Jury—Summoning.—A sheriff directed to summon talesmen from bystanders need not summon every man he meets.—*State v. Bouvy*, La., 50 So. 849.

61. Landlord and Tenant—Action for Rent.—A landlord suing for rent of premises, vacated by the tenant held not bound to relet, but entitled to treat the tenant as still occupying under the lease, and look to him for the entire rent.—*Boardman Realty Co. v. Carlin*, Conn., 74 Atl. 682.

62.—Enjoyment of Premises.—A lessor must be held to have intended that the lease should be beneficial to lessee, and, in so far as he is concerned, that he will do no act to interrupt the peaceable enjoyment of the thing granted.—*National Hollow Brake Beam Co. v. Bakewell*, Mo., 123 S. W. 561.

63.—Landlord's Option on Tenant Holding Over.—When a tenant holds over after expiration of his term, the landlord may either treat him as a trespasser or hold him to a continuance of the tenancy on the same terms.—*Long v. Grant*, Ala., 50 So. 914.

64. Larceny—Indictment.—An indictment for stealing a certain sum of lawful money of the United States held not sustained by the proof, where it failed to show that the money was

issued by authority of the United States Government.—*Snelling v. State*, Tex., 123 S. W. 610.

65. Libel and Slander—Indictment and Information.—Under an indictment for slander, alleging that defendant said that he had carnal intercourse with a named woman, the admission of evidence that he said that he had a time with her constitutes a fatal variance.—*Hasley v. State*, Tex., 123 S. W. 596.

66. Life Estates—Adverse Possession.—Where a purchaser became the owner in fee of an interest in real estate and the owner of a life estate, no question of adverse possession could arise before the death of the life tenant.—*Cramton v. Rutledge*, Ala., 50 So. 900.

67. Life Insurance—Burden of Proof.—The burden of proof was on the maker of a note given for a premium on a policy to be delivered within a reasonable time to show that the time consumed was unreasonable.—*Deleon v. Walter*, Ala., 50 So. 934.

68. Marriage—Presumptions—Proof of a marriage, whether solemnized in strict conformity with law or not, entered into in good faith and under the belief that the ceremony is legal, overcomes any presumptions arising out of prior meretricious relations.—*Ollschlager's Estate v. Widmer*, Or., 105 Pac. 717.

69. Master and Servant—Defective Appliances.—The master's common-law duty held to furnish, not good and safe, but only reasonably safe and suitable, instrumentalities employed in the business.—*Huyck v. McNerney*, Ala., 50 So. 926.

70.—Negligence.—A coal mining company would be liable for the death of a miner caused by the explosion of powder stored in the mine if it was negligent in storing the powder and knew or should have known that caps were kept with the powder, and the explosion would not have occurred without such negligence though it could not be directly attributed to the negligence of any one.—*O'Brien v. Corra-Rock Island Mining Co.*, Mont., 105 Pac. 724.

71. Mines and Minerals—Recording Notice of Claim.—Where the recorded notice of a mining claim was a copy of the notice posted which was insufficient only because not posted on the claim, that the valid notice subsequently posted which differed from the first notice only in omitting the name of a witness was not again recorded was immaterial as against subsequent claimants.—*Green v. Gavin*, Cal., 105 Pac. 761.

72. Mortgages—Foreclosure.—Under Kirby's Dig., sec. 5399, the foreclosure of a mortgage is not barred until the debt is barred, and on the death of the mortgagor before that time the statute of limitations is displaced by the statute of nonclaim, barring the right to foreclose unless the claim is probated against the mortgagor's estate within two years.—*Mueller v. Light*, Ark., 123 S. W. 646.

73.—Pleadings in Foreclosure Proceedings.—Where an allegation that the claims of certain defendants to mortgaged premises were subject to plaintiff's mortgage was not denied, the decree and sale barred all liens and interests acquired subsequent, but not prior, to the mortgage.—*Wardlow v. Middleton*, Cal., 105 Pac. 738.

74.—Priorities.—Where the increased value of the property caused by the work done by complainant exceeded the amount due him, his lien was to that extent prior to a mortgage executed before the lien was created.—*Climax Lumber Co. v. Bay City Mach. Works*, Ala., 50 So. 935.

75. Municipal Corporations—Use of Streets.—A pedestrian crossing a street held not guilty of contributory negligence in failing to look for automobiles approaching on the wrong side of the street.—*Bradley v. Jaeckel*, 119 N. Y. Supp. 1071.

76. Navigable Waters—Capacity for Transportation.—Where a body of water is sufficiently large and deep to serve the public to any considerable extent, held sufficient to give the public an easement therein for the purpose of transportation.—*Conneaut Lake Ice Co. v. Quigley*, Pa., 74 Atl. 648.

77. Negligence—Res Ipsa Loquitur.—The doctrine of res ipsa loquitur held applicable to in-

cined railway accident.—*Burke v. State*, 119 N. Y. Supp. 1089.

78. **Nuisance—Uncapped Wells.**—That certain artesian wells in a stream were left uncapped in violation of St. 1877-78, p. 195, c. 153, did not constitute a private injury to a lower riparian proprietor, where the water did not go to waste during the irrigation season.—*Hudson v. Dailey*, Cal., 105 Pac. 748.

79. **Patents—Suit for Infringement.**—Where a lessor of a patent, joining lessor, sued for infringement damaging lessee and its business, and carried the cost of the litigation, held, that it would seem to be entitled to all the benefits.—*National Hollow Brake Beam Co. v. Bakewell*, Mo., 123 S. W. 561.

80. **Payment—Acceptance of Note.**—While the acceptance of a non-negotiable note for a previous existing debt of a like amount is not payment of the debt, unless the parties so stipulate, the acceptance of a negotiable note for a like amount is presumed to be in payment, though such presumption may be rebutted.—*Stevenson v. Stunkard*, Ind., 90 N. E. 106.

81. **Physicians and Surgeons—Malpractice.**—A physician held not required to protest against an operation performed contrary to his advice, and hence his approval could not be inferred from his silence.—*Lawson v. Crane & Hall*, Vt., 74 Atl. 641.

82. **Pleading—Negligence.**—An abutting owner's statutory duty to repair sidewalks does not relieve the city from liability for its negligence in failing to keep them in repair.—*City of Pensacola v. Jones*, Fla., 50 So. 874.

83. **Pledges—Conversion.**—Where county scrip is deposited with a bank as security for a loan and the scrip is converted, the pledgor is entitled to sue for the value at time of conversion, less the amount of his debt.—*Hamburg Bank v. George & Butler*, Ark., 123 S. W. 654.

84. **Indorsement as Collateral.**—The indorsee of a note as collateral for a loan held entitled to collect the full amount thereof from the maker, regardless of the state of the account between himself and the person from whom he received it.—*Hillman v. Stanley*, Wash., 105 Pac. 816.

85. **Principal and Agent—Contracts.**—An agreement between a sub railroad contractor and one who was not the contractor's agent held not a modification of the subcontract.—*Grigsby Const. Co. v. Colly*, La., 50 So. 855.

86. **Limitation of Action.**—An indorser cannot successfully contend that his partial payment of a note did not toll the statute of limitations because he understood at the time that it was a payment in full, where his agent had knowledge of the facts which rendered it only a partial payment.—*Jefferson County Nat. Bank v. Dewey*, N. Y., 90 N. E. 113.

87. **Negligence of Agent.**—The hiring of a horse by a traveling salesman with which to reach another town is such a "necessary" and "reasonable" incident as to render the latter liable for negligent injury of the horse.—*Rexroth v. Holloway*, Ind., 90 N. E. 87.

88. **Principal and Surety—Notice to Surety of Default.**—The obligee in a building contractor's bond need not notify the sureties of the default of the contractor, where the contract does not require it.—*Jones v. Gaines*, Ark., 123 S. W. 667.

89. **Prohibition—Judges.**—Before a judge should be prohibited from doing an act, it should appear that he is about to do the act, and, where he denies in his return that he will do the act complained of, the peremptory writ should not issue.—*Lewis v. Superior Court of Butte County*, Cal., 105 Pac. 763.

90. **Public Lands—Homestead Entry.**—An illegal contract by an entryman to convey a homestead held not validated by oral agreement made after patent has been received.—*Harris v. McCrary*, Idaho, 105 Pac. 558.

91. **Railroads—Cattle Guards.**—No liability attaches to a railroad company for failure to put a cattle guard in a place where to do so would endanger the lives or limbs of its employees.—*Corcoran v. Wabash R. Co.*, Mo., 122 S. W. 743.

92. **Duty to Look and Listen.**—It is negligence for a traveler approaching a railroad crossing to fail to look and listen for the approach of trains, and it is only in exceptional cases that the court may submit to the jury whether the failure was excusable.—*Garrison v. St. Louis, I. M. & S. Ry. Co.*, Ark., 123 S. W. 657.

93. **Fires.**—In an action for fire set by a locomotive, the burden held on defendant to show, at least *prima facie*, that the fire was committed without negligence in the construction and operation of the locomotive.—*Sullivan Timber Co. v. Louisville & N. R. Co.*, Ala., 50 So. 941.

94. **Injury to Adjoining Lands.**—A railroad company was liable for the acts of its construction crews in letting down fences and permitting stock to destroy the crops of an adjoining landowner.—*Hord v. Holston River R. Co.*, Tenn., 123 S. W. 637.

95. **Injury to Person Near Track.**—To operate a train through a town while it is dark at a rate of speed prohibited by ordinance does not, without more, constitute that wantonness which is the equivalent of intentional wrong, and which would render the railroad liable for the death of a trespasser.—*Martin v. Union Springs & N. Ry. Co.*, Ala., 50 So. 897.

96. **Look and Listen Rule.**—The look and listen rule held inapplicable to a person approaching a railroad crossing at night of which he had neither warning nor knowledge.—*Chicago & E. R. R. Co. v. Fretz*, Ind., 90 N. E. 76.

97. **Vestibuled Cars.**—It is the duty of train employees to exercise the highest degree of care to see that the trapdoors over the steps of vestibuled cars are closed and kept closed while the train is in motion.—*St. Louis, I. M. & S. Ry. Co. v. Oliver*, Ark., 123 S. W. 662.

98. **Sales—Breach of Contract.**—Where a contract of sale is broken by furnishing unmarketable goods, damages may be recovered for loss of profits caused thereby.—*Independent Brewing Ass'n v. Burt*, Minn., 123 N. W. 932.

99. **Contracts.**—A buyer of goods for resale held entitled to be reimbursed on account of an advertising account.—*Baldwin v. Feder*, 119 N. Y. Supp. 1044.

100. **Performance of Contract.**—A contract to sell cedar poles held not affected by the fact that the seller had not made final proof on his homestead.—*Northern Mercantile Co. v. Schultz*, Wash., 105 Pac. 850.

101. **Schools and School Districts—Claims Against District.**—Communication by the clerk of a school board to a claimant held not to create any obligation on the part of the district.—*Kenyon-Noble Lumber Co. v. School Dist. No. 4 of Gallatin County*, Mont., 105 Pac. 551.

102. **Contracts of Employment.**—A teacher, in accepting employment impliedly agrees that he has the learning necessary to enable him to teach the branches to be taught, and that he has the capacity in a reasonable degree of imparting that learning to others.—*Biggs v. School City of Mt. Vernon*, Ind., 90 N. E. 105.

103. **Sheriffs and Constables—Right to Compensation.**—A deputy sheriff cannot pursue a fugitive from justice into another state and claim his compensation therefor from the county in which he is deputy.—*Roberts v. Board of Com's of Custer County*, Idaho, 105 Pac. 797.

104. **Specific Performance—Contracts Enforceable.**—A court could not compel the specific performance of a contract to form a corporation and compel such corporation to elect certain persons officers at a fixed salary.—*Perrin v. Smith*, 119 N. Y. Supp. 990.

105. **Defense of Fraud.**—The defense of fraud interposed in a suit for the specific performance of a deed of standing timber must allege that the fraud was discovered within six years before the filing of the answer.—*Marthinson v. McCutchen*, S. C., 66 S. E. 120.

106. **Enforcements.**—Where a right of way was clearly reserved in the deed and was denied by the servient tenant, it was the court's duty to enforce specific performance by establishing the right, defining the track and enjoining disturbance.—*Webb v. Jones*, Ala., 50 So. 887.

107. **Statutes—Approval of Governor.**—The motives of the Governor in approving an appropriation bill cannot be made the subject of judicial inquiry for the purpose of invalidating

or preventing the full operation of the bill.—*Lukens v. Nye*, Cal., 105 Pac. 593.

108.—**Certainty.**—Courts should not make a mere guess at the legislative intention in order to uphold and enforce a statute, where it is so uncertain as not to be susceptible of reasonable interpretation.—*Beaumont Traction Co. v. State*, Tex., 122 S. W. 615.

109.—**Construction.**—The maxim that without which a grant would not be effective is deemed to pass with the grant, though generally applied to grants of realty, is also adapted to the construction of statutes.—*Portland Railway, Light & Power Co. v. Railroad Commission of Oregon*, Or., 105 Pac. 709.

110. **Street Railroads.**—Duty of Motorman.—Whether a motorman saw the danger in which a traveler was placed by reason of his horse becoming frightened by the car, and whether the motorman exercised reasonable care, held, under the evidence, for the jury.—*Austin v. Vicksburg Traction Co.*, Miss., 50 So. 632.

111.—**Right to Operate.**—A natural person or a firm or joint stock association can engage in the business of operating an electric street railway as well as a corporation.—*Beaumont Traction Co. v. State*, Tex., 122 S. W. 613.

112. **Subrogation—Loss of Right.**—A satisfaction of the debt by plaintiff on payment of the amount due by the owner of a half interest in the mortgaged property acquired after suit to foreclose would not impair the right of subrogation.—*Murray v. O'Brien*, Wash., 105 Pac. 840.

113. **Taxation—Enforcement Against Land.**—A tax proceeding did not divest the title of devisees under a will whose property was held in trust, where the trustee only was named, and there was nothing to indicate that the proceeding was intended to bind the beneficiaries.—*Rothenberger v. Garrett*, Mo., 123 S. W. 574.

114.—**Judgment.**—The special statute of limitations applicable to tax sales does not apply where some of the jurisdictional steps of precedent conditions are wanting rendering the sale and deed void.—*Clifford v. Hyde County*, S. D., 123 N. W. 872.

115.—**Tax Sales.**—A tax sale held void as against public policy, where the collector bid in the land for a person who was not present at the sale.—*Hubbard v. Taylor*, Vt., 74 Atl. 641.

116. **Telegraphs and Telephones—Delay in Delivery of Message.**—The sender of a social message held not entitled to recover punitive damages for delay in delivery.—*Sledge v. Western Union Tel. Co.*, Ala., 50 So. 886.

117.—**Obstruction in Street.**—The fact that a pedestrian, who stumbled on the stump of a telephone pole in a street, attempted to cross the street at night when he could not see the stump, must be considered in determining whether he employed proper care.—*Dobbins v. Western Union Telegraph Co.*, Ala., 50 So. 919.

118. **Tenancy in Common—Adverse Possession.**—The possession of one tenant in common is the possession of all, until there is an actual adverse possession, brought home to the knowledge of the other.—*Cramton v. Rutledge*, Ala., 50 So. 900.

119.—**Adverse Possession.**—A tenant's repudiation of the right of his co-tenants, and a claim of exclusive ownership, brought to their actual knowledge, will make his possession adverse.—*Oliver v. Williams*, Ala., 50 So. 937.

120.—**Lease to Co-Tenant.**—Where one of two tenants in common, leasing his co-tenant's half of the land, distinctly notifies him he will not rent again on the former terms, and they fail to agree, his occupancy at the end of the term becomes, as it was before, possession for both.—*Long v. Grant*, Ala., 50 So. 914.

121. **Tender—Estoppel.**—The law of tender is as much for the benefit of the debtor as the creditor, and a creditor cannot refuse a tender believing it to be to his advantage to do so, and thereafter insist that an unqualified tender has not been made good.—*Murray v. O'Brien*, Wash., 105 Pac. 840.

122. **Theaters and Shows—Regulation of Horse Racing.**—Horse racing may be regulated by a state under the police power, or may be

prohibited altogether.—*State Racing Commission v. Latonia Agricultural Ass'n*, Ky., 123 S. W. 681.

123. **Trespass—Cutting and Removing Timber.**—In an action for cutting and removing timber, proof that some of it was cut by defendant was insufficient to charge it with responsibility for all the timber missing from plaintiff's land during an indefinite period of two or three years.—*Stoneham-Zearing Lumber Co. v. McComb*, Ark., 122 S. W. 648.

124.—**Injuries Caused by Fright.**—In an action for injury to plaintiff's wife from fright and humiliation caused by defendant's agents going upon plaintiff's premises in the nighttime, held error to direct a verdict for defendant.—*Alexander v. St. Louis Southwestern Ry. Co. of Texas*, Tex., 122 S. W. 572.

125. **Torts—Acts Constituting.**—A statement of the truth made for the sole purpose of damaging a person by causing a third person to refuse to further deal with him is actionable if damage ensues.—*Huskie v. Griffin*, N. H., 74 Atl. 595.

126. **Trusts—Constructive Trusts.**—Where a testator is induced either to make a will, or not to change one theretofore made, by a legatee's promise to devote his legacy to a lawful purpose, an enforceable secret trust is thereby created.—*Rutherford v. Carpenter*, 119 N. Y. Supp. 790.

127.—**Who May Become Trustee.**—It is competent for a person creating a trust to himself become the trustee or to make the beneficiary the trustee.—*Cahlan v. Bank of Lassen County*, Cal., 105 Pac. 765.

128. **Vendor and Purchaser—Option Contracts.**—No title passed under an option to purchase land which required the owners to furnish the option holder a survey and tender an acceptable title within 90 days, where it did not appear that any survey or abstract of title was ever tendered, or that the option holder paid anything for the land.—*Little v. Cardwell*, Ky., 122 S. W. 799.

129.—**Vendor's Lien.**—The act of a vendor, manifesting an intention that a vendor's lien shall not exist, must be one substantially inconsistent with the continued existence of the lien.—*Finnell v. Finnell*, Cal., 105 Pac. 740.

130. **Waters and Water Courses—Construction of Railroad.**—The granting to a railroad company of a right of way did not authorize it to construct an embankment thereon so as to obstruct the natural drainage of adjoining land and overflow it, and, if the embankment obstructed the natural flow, it was found to drain it by culverts or ditches.—*Kelly v. Kansas City Southern Ry. Co.*, Ark., 123 S. W. 664.

131.—**Injury to Percolating Waters.**—Owners of land bordering a stream held not entitled to intercept percolating waters therein and apply the same to other than a reasonable use on the land.—*City of Los Angeles v. Hunter*, Cal., 105 Pac. 755.

132.—**Rights of Landowners.**—A landowner is entitled to the reasonable use of percolating waters, though it may impair the same right of his neighbor, whether they are percolating waters feeding a stream or not.—*Hudson v. Dailey*, Cal., 105 Pac. 748.

133. **Witnesses—Contempt.**—Where a witness is guilty of contempt in refusing to answer a pertinent question when ordered so to do, and refuses to pay the fine imposed on him, he may be committed to jail until such fine is paid and the question answered.—*Ex parte Hanson*, Kan., 105 Pac. 694.

134.—**Impeachment.**—Where the state attacks a witness for accused by showing statements made out of court, contradictory to his testimony, it is permissible for accused to show that the witness had made statements in consonance with his testimony.—*Hardin v. State*, Tex., 122 S. W. 613.

135. **Work and Labor—Variance in Proof.**—A count for work and labor done on a certain date could not be sustained by proof of work done on any other date.—*Green v. Southern States Lumber Co.*, Ala., 50 So. 917.

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JUDGES WORKING OUT THEIR PERSONAL CONVICTIONS.

We were much struck, upon reading the concurring opinion of Mr. Justice White in the case of Pullman Co. v. Kansas, 30 Sup. Ct. 232, by some remarks therein, which we will presently quote.

This case involved the same question as Western Union Tel. Co. v. Kansas, 30 Sup. Ct. 190, which we discussed in 70 Cent. L. J. 109. In that case a concurring opinion by Justice White rested itself upon the fact that a foreign corporation, engaged in interstate business being in Kansas already, it was confiscatory to impose such a condition to its doing local traffic, as was attempted. In the opinion in the Pullman Co. case he seems to have abandoned this theory and to insist that the cases, which decide that a state has the absolute power to exclude foreign corporations from its borders, do not necessarily mean that it has absolute power to prohibit the doing of local traffic by a foreign corporation which has the right of entrance for the transaction of interstate business. But he appears to stand alone in the view, that to interfere with such a corporation is a direct burden on interstate commerce.

He speaks of the state's power not being absolute to exclude from its borders a corporation engaged in interstate business, and as it seems to us he assumes that the power to exclude from local business is also not absolute, but only relative. But why, or in what way, it is only relative is not precisely indicated. As to other foreign corporations the incidental effect on interstate commerce is negligible, no matter

how serious this incidental effect may be. It is not shown that the effect of prohibiting an interstate corporation from doing local business would do any more than take away from its volume of business, affecting thus, as we think, in an *incidental* way, interstate business, because the facilities of a particular kind of corporation have not so free a swing in every zone over or to which its *radii* extend.

We may imagine that the effect on interstate business might, so to speak, be more acute, but not less incidental. The consequences which ultimately influence interstate business arise from the same cause—the barrier against foreign corporations doing local traffic.

The remarks referred to above are the following: "None of the cases referred to prevent me, in this case, from acting upon my independent convictions, even if it be conceded that expressions may be found in the opinions in some of the cases, which, when separated from their context, and apart from the subject-matter of the controversies which the cases presented, would tend to conflict with the views I have expressed. This is said because certain is it that in none of the cases is the slightest reference made to the distinction between the absolute and relative power which this case involves, and the direct burden which must result to interstate commerce from the attempt to exert absolute power, where, as the result of the interstate commerce clause of the constitution, relative power alone obtains. When first, after the duty came to me of taking part in the work of the court, the question arose of the right of a state, in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my

duty to enforce in such a case the previous rulings of the court, however much, as an original question, I would have held a contrary view."

One cannot but ask himself whether Justice White would thus have theorized about absolute and relative power, if he had agreed with the principle in previous rulings. And yet, whether he agreed or not, obedience to all legitimate inference therefrom is as binding upon him as a judge as that which they directly hold. All judges should enforce precedents and inferences therefrom, which they apprehend alike, in an uniform way, whatever their prior opinions upon the questions involved.

There seems here, frankly expressed, the portrayal of an influence which is the fruitful womb of much of the lamentable contrariety manifesting itself in American decisions. It is the influence which leads to a sticking in the bark in the interpretation of decided cases. It is that which narrows the application of rulings, puts a strait jacket upon principles and makes of them not "wise saws," but only "modern instances."

By this course we do not regard our courts as builders of a system of jurisprudence. Instead, we seem to ignore courts as courts entirely, and look upon their presiding incumbents as appointed to place stepping stones of narrow breadth and doubtful stability in a sort of marsh. They may not rest on bedrock, or may be otherwise treacherous to the tread, and they are not pillars for a temple.

Constructiveness in precedent seems, indeed, to be vanishing from our judicial tribunals, and the spirit, which would refine away ruling and confine it to the strictest limits, has taken its place. This, however, would not be so great an evil, if the acumen which differentiates proceeded more from knowledge of legal principles than from intellectual acuteness or mere logical exactitude.

Distinctions which may be reasoned out in following the channels which flow from the fountains of jurisprudence exemplify the science of the law. Speculative differences which alertness in mentality may discover simply "pile Pelion on Ossa" in the tomes on tomes of print, whose authors might find it difficult, in later years, to remember their own contributions—as might everybody else, except they came to vex on being unearthed.

The feeling of the need of a basis for things—few and simple though they may be—is becoming widespread. Decisions in causes are but incidents. One litigant wins the other loses. A sovereign state has its courts to construe its enactments. It is a necessity of justice that they be consistently enforced. If the courts cannot breathe into them a fullness of life, the complexity of our civilization but multiplies the pitfalls of our time. This life cannot be imparted by judges merely resourceful in dialectics. They must be versed in the science of law.

But this declaration by the learned justice, though frank, seems, nevertheless, not to have been demanded or strictly appropriate. If he meant to say that prohibiting a foreign corporation engaged in interstate commerce from doing local traffic, is, of itself, to put a direct burden on interstate commerce, every judge on the bench accepting his premise would agree to his conclusion. If it merely produces an incidental effect, all would say the prohibition is valid, according to the very letter of prior decision, provided, the requirement is not that the corporation lay a direct burden on interstate commerce or give to a state the right to tax property outside of its borders, as was ruled by the majority. In either event Judge White's remarks seem inapplicable.

The feature of these cases, which declares the tax illegal as based on outside property, would appear to make void the tax on all foreign corporations—as well those engaged in interstate commerce as those not so engaged. The state of Kansas appears to have overreached itself.

NOTES OF IMPORTANT DECISIONS.

DOWER—INCHOATE RIGHT AFFECTED BY BANKRUPTCY PROCEEDINGS AND BANKRUPT'S RESIDENCE.—Several questions quite interesting and important in reference to dower were disposed of by a bench in Eighth Circuit Court of Appeals, composed of Adams, C. J., Amidon and Riner, D. J.J., Thomas v. Wood, 173 Fed. 585. Amidon, D. J., wrote the opinion, from which Riner, D. J., dissented. That the casual personnel of benches in this class of courts appears to make decisions therein like a record of individual views, is why we often designate, as above, the participants in decisions.

The facts show that the bankrupt was a resident of Kansas, in which state there is no right of dower, but among assets of the bankrupt estate were lands in Missouri, whose courts hold that the right of dower there provided for accrues as well to non-residents as residents in lands there situated. This dower right attaches to land of which the husband is seized during the existence of the marriage relation, and not, as in one or more exceptional jurisdictions, at the time of the husband's death.

The contentions relied on against the wife's right of dower were that to apply dower rights of various states would destroy uniformity in the bankrupt act; that the right of dower is of the same class as that of exemptions and homesteads which are confined to bankrupt's domicile, and that the statute specifically provides that only dower right of residence shall prevail in bankruptcy administration.

The first contention is considered disposed of adversely by Hanover Natl. Bank v. Moyses, 186 U. S. 181, and a lengthy extract is also made from an early Circuit Court case, Darling v. Berry, 13 Fed. 659.

The second contention is also ruled adversely on the ground that the only similitude between rights of exemption and homesteads and that of dower is that all "are in a general way for the protection of the family. * * * The homestead and exemption are a part of the bankrupt's estate. * * Dower on the other hand, is no part of the bankrupt's estate." This is the gist of the argument on this subject. See also Randall v. Krieger, 23 Wall. 137.

The third contention was based on section 8 of the bankruptcy act, which reads as follows: "The death or insanity of a bankrupt shall not abate the proceedings. * * * Provided, that in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the state of the bankrupt's residence." The opinion gave four reasons why this section and pro-

viso should not control; first they referred merely to death pending proceedings, and here the husband was still alive; second, the purpose was to provide for no abatement, and the proviso was merely cautionary as preserving all her rights where there was no death; third, the cautionary argument is an extension or fuller explanation of this theory; and, fourth, the proviso was in view of differing state laws as to right of dower, nine states giving dower only in real property of which the husband was seized at the time of his death, and some, dower rights in personal property of which he was so seized, while others give dower in real property of which he was seized during coverture, this view was upheld in *In re McKenzie*, 142 Fed. 383, as decided also by a bench of the same court. The proviso, therefore, was meant to prevent title, vested by bankruptcy proceedings in the trustee, from operating like a sale during coverture, as to land where relinquishment of dower was not necessary. This liberal view was not required as to the real estate here in question, as dower in Missouri applies in cases last above mentioned. But it is even doubted whether the section would be constitutional as applied to the case at bar, if it should be construed to apply to such a case because the wife's inchoate right of dower could not be thus displaced, because this is a vested right.

THE HISTORICAL INTERPRETATION OF "FREEDOM OF SPEECH AND OF THE PRESS."—PART II.—ILLUSTRATIVE QUOTATIONS SHOWING MEANING OF FREE SPEECH PRIVILEGE.*

The varying conception of limits of freedom of utterance, as advocated by these classes of controversialists, will now be exemplified by illustrative quotations, to the end of showing what was meant by an unabridged liberty of utterance, by those whose views were incorporated in our constitutions.

Licensing the Printer.—The Press was introduced into England by Henry VIII. From this fact, together with the prevailing opinion that the whole matter of freedom of speech was one of permission, or gift from the sovereign, nothing was more natural than that Edward the VI. should, by

* Part I. of this article appeared in last week's issue of this Journal.

patent, appoint a printer, who was to print and sell all Latin, Greek and Hebrew books, as well as all others that might be commanded, and penalties were denounced for infringing his monopoly. Subsequently the number of licensed printers was enlarged, but for a considerable time it was limited.¹ In this form of license the letter of the law made no discrimination against a book according to the sentiments expressed. The license seems rather to have been a business monopoly given to some court favorite, and a matter of confidence in the printer, as one having the discretion to publish nothing inimical to the grantors of his special privilege. Of course, this public printer did not publish for future reference any of the arguments against his monopoly. Could we now look back to analyze the opposition to this first form of licensing, we would seek for two possible explanations of it. According to one, freedom of the press might mean only the commercial freedom to use the press as a tool of trade, in commercial competition with the crown-monopolists, and a modern judge adopting that conception as a basis for constitutional construction, might uphold a law creating a censorship only over the character of the printed matter, and not directly and immediately effecting the equality of commercial opportunity in the use of the printing press as an instrument of commerce. According to this first point of view the abolition of this monopoly was the chief, or only, end in view, and this object would not be in the least interfered with by a new form of censorship directed against particular psychologic tendencies of opinions, which would leave intellectual liberty just as much abridged as before.

The other view would be that the opposition to licensing of the printer was based principally upon the demand for a larger intellectual liberty, by equalizing the opportunity of all for using the press as an extended form of speech. In this second view, the mere abolition of the license for printers monopoly is not an end in itself, but a mere

means to the end of increasing intellectual liberty and opportunity, a viewpoint quite constantly ignored by our judicial utterances upon this subject. It is unthinkably paradoxical that the few friends of freedom of speech and of the press, who existed at that time, should have had no interest in the enlargement of intellectual liberty, and were interested only in the enlarged opportunity for the commercial use of the press as a tool of trade.

Of course, this view, that enlargement of intellectual opportunity was the chief end sought, is confirmed by the related controversial literature of approximately that time. As I write this I have before me a volume in which are reprinted the tracts on "Liberty of Conscience," which had been published prior to 1661. These express "the first articulations of infant liberty." The arguments are in the main very crude, as arguments for liberty. They may be clearly divided into a few general classes: First, "We dissenters are right, therefore ought to be tolerated;" second, "the Bible teaches toleration, therefore we should be tolerated;" third, "it is not in the power of man to believe as he wills, but he believes, as he must, and he therefore should not be punished for expressing convictions he cannot escape." This last is a good argument against the injustice of punishing "dangerous" opinions, even yet. But amid much crude thinking there are some few very clear perceptions, excluding all mere psychological crimes from the legitimate province of government. To this end Luther was quoted, and his thought is several times restated by different authors. Luther's words are these: "The laws of civil government extend no farther than over the body and goods, and that which is external. For over the soul (mind), God will not suffer man to rule." Such were the contentions made in behalf of liberty of speech, or "the liberty of prophesying," as it was then often called. One would look in vain through this volume of early tracts for any suggestions that the larger liberty contended for, or an unabridged freedom of dis-

(1) Patterson's *Liberty of Press*, p. 44.

cussion, consisted only in the absence of a *prior* censorship.¹ I do not even recall a single mention of a previous censorship as the essence of the evil, nor mere commercial opportunity to use the press as a tool of trade as an end to be achieved. Always the demand is for, and indeed the arguments were all in furtherance of a larger intellectual liberty and sometimes demanded an unabridged liberty of utterance by excluding all psychological offenses from the jurisdiction of the criminal law.

These early tracts, so far as they go, are a vindication of the contention, stated at the head of this essay, as that relates to the period prior to 1661. It is utterly absurd for our courts to intimate, as they do, that the real friends of unabridged intellectual opportunity were ever concerned only with the *mere time or manner* (rather than the *substance*) of the abridgement of liberty. The friends of freedom never sought the abolition of previous restraint in favor of subsequent punishment, as an end in itself, but were seeking to enlarge intellectual opportunity as against abridgement either by prior restraint or subsequent punishment.

No doubt it was in this early protest against a licensed printer that the phrase "freedom of the press" came into use, for here only does it have a literal signification. When the press was made free, as an instrument of trade, the shifty tyrant saw to it that no enlargement of intellectual opportunity resulted.

Usurpation by the "Star Chamber."—Prior to 1637 there seems to have been no criminal penalties inflicted by the English secular courts, for mere psychologic offenses, such as the expression of unpopular opinions. "The Common Law took cognizance of no injuries but such as effected persons or property."² In 1637 the Star Chamber, which never hesitated to assume the most preposterous powers, usurped the legislative functions of penalizing libel, by

its decree to regulate the press.³ This judicial lawlessness, in usurping the power to punish mere psychologic crimes under ex post facto criteria of guilt, of course provoked criticism from those who loved liberty and knew something of its nature, and no doubt it also secured for "the watchtower of the King" the hearty approval of all tyrants, for the protection of whose reputation and prerogatives this abridgement of freedom of utterance was inaugurated. This usurped censorship and the accompanying ex post facto penalization of mere psychological crimes, was among the last and most hideous of the acts of this infamous "Judicial" body, for the Star Chamber Court was abolished in 1640. No doubt the hostility excited by its outrageous creation and enforcement of laws against mere verbal crimes, contributed much towards the downfall, but tyranny did not die with the institution that invented this special means to its end. The co-tyrants of the Star Chamber Court and their successors, prompted by the same inordinate lust for power and preferring to be relieved of the occasion for defending their official conduct, with slight modifications and very brief cessations, have continued to act upon the precedents of the abhorred Star Chamber, to this very day. Parliamentary enactment along similar lines soon took the place of Star Chamber decrees, and vagueness in the legislative definition of criminal libel left quite unimpaired the power for an ex post facto creation of the criteria of guilt. So it comes to pass that while maintaining some of the outward seemings of law, the fundamental evils of judicial despotism still exist, even in those countries whose inhabitants are most loud-mouthed in their stupid boast over a purely imaginary liberty. However, let it be said, that the savagery of the penalties has been a little abated, even though, on the whole, intellectual liberty has received no substantial enlargement. What has been gained as to

(3) Patterson on Liberty of Press and Speech, 145; Mence, Law of Libel, Chapt. IX, 1824; The Freedom of Speech and Writing, pp. 47, 49, 99, Lond. 1766.

some subjects has been lost as to others. Some comparison as to this would be interesting, but is not within the scope of this essay.

Licensing the Book.—The licensing of one printer was succeeded by the licensing of many and later to the abolition of this system in its entirety, allowing all alike to use the printing press as an instrument of commerce, but maintaining inequalities as to its use in the distribution of ideas. Here I have reference to those various licensing acts, expiring in 1694, which succeeded to the Star Chamber decrees, and by which a censor authorized particular books to be printed, and all publications not so authorized were penalized. It was against this censorship that Milton directed his immortal essay, "Aeropagitica."

Here again we must seek an answer to the same old question, is it true, as our courts generally assert, that Milton and others who opposed these licensing acts were only concerned with the *manner* and not with the *substance* of this abridgement of freedom of the press? Is it true, as our courts usually imply, that the opponents of these licensing acts demanded only the abolition of the censor and *previous restraint*, and were quite willing to admit a power to punish subsequent to publication, all those opinions which formerly had been denied the necessary license for getting into print? In Milton's time one might print unpopular opinions, which the licensor had disapproved, and be punished if caught. This the Supreme Court of the United States says is an *abridgement* of freedom of the press. However, if there is no previous censorship, and although you receive the same penalty, merely for publishing the same book, because a legislature or jury deem it contrary to the public welfare, then *unabridged liberty of the press is thereby preserved*, for the "greatest judicial tribunal on earth" has said that a constitutionally guaranteed, natural right, to *unabridged* freedom of press, "is to prevent all such previous restraint as had been practiced by other governments and does not prevent the

subsequent punishment of such as may be deemed against the public welfare."

In other words, our courts declare that our constitutional right to unabridged freedom of utterance deals only with the manner and time of the abridgement, or the tribunal which inflicts it, and has nothing to do with unabridged intellectual opportunity to utter, to hear and to read. Be it remembered, however, that no such distinction, in favor of any ex post facto censorship, can be deduced from the very words of our constitutions, nor from the historical controversy culminating in their adoption, and therefore, these exceptions to unabridged freedom are a matter of judicial creation—that is, of judicial constitutional amendment.

In Defense of the Censorship.—Then, as now, the advocates for the suppression of unpopular opinions refused to see that to admit the existence of the power to suppress any opinion, in the long run, is more destructive to human well-being than the ideas against which they would have the power exercised. Then, as now, the alleged immediate public welfare was the justification of every form of censorship, and some dangerous tendency, only speculatively ascertained and usually so in a feverishly apprehensive imagination, was always the test of guilt. "The most tyrannical and the most absolute governments speak a kind parental language to the abject wretches who groan under their crushing and humiliating weight." To make this clear it is necessary to quote only a few passages from a publication dated A. D. 1680, and written in defense of the abridgements of freedom of speech and press. Sir Robert L'Estrange in, "A Seasonable Memorial in Some Historical Notes Upon the Liberties of the Press and Pulpit," quotes Calvin as saying: "There are two sorts of seditious men, and against both these must the sword be drawn: for they oppose the King and God himself." He then exhibits the evolution of dangerous tendencies by these words: "First they find out corruptions in

the government, as a matter of grievance, which they expose to the people. Secondly, they petition for redress of those grievances still asking more and more, till something is denied them. And then, thirdly, they take the power into their own hands of relieving themselves, but with oaths and protestations that they act only for the common good of King and Kingdom. From the pretense of defending the government they proceed to the reforming of it; which reformation proves in the end to be a final dissolution of the order, both of Church and State. * * * * * Their consciences widened with their interest. * * * * * First they fell upon the King's reputation; they invaded his authority in the next place, after that they assaulted his person, seized his revenue; and in the conclusion most impiously took away his *sacred* life

* * * * * *The Transition is so natural from popular petition to a tumult, that the one is but a hot fit of the other; and little more than a more earnest way of petitioning.* * * * * * They preach the people into murder, sacrilege and rebellion; they pursue a most gracious prince to the scaffold; they animate the regicides, calling that execrable villainy an act of public justice, and entitling the Holy Ghost to treason."⁵

This argument, backed by the historical fact, is unanswerable to the point that to permit freedom of criticism of government and its officials, and to allow the presentation of petitions for the redress of grievances, is to permit that which tends to promote actual treason and rebellion. It follows that those who were demanding the opportunity to express their sentiments in criticism of official conduct were in effect demanding the right verbally to promote treason with impunity, because that was the demonstrated tendency of such utterances. That is what unabridged freedom of speech and of the press meant to its advocates, and our constitutional guarantee for an *unabridged* freedom of utterance

(5) In addition to "A Seasonable Memorial," see for similar argument, "A Discourse of Ecclesiastical Politie, Wherein the Mischiefs and Inconveniences of Toleration Are Represented," London, 1670.

was a final decision in favor of that view and against all mere psychologic crimes, including even verbal "treason."

The Defense of Freedom, by Milton.—In further justification of the contention that *unabridged* freedom of utterance as a matter of right precludes the suppression of opinions having a "dangerous" tendency, either by direct prior restraint, or subsequent punishment, the fear of which always operates as a prior restraint, we should contrast the foregoing argument for restricting speech with the historic argument for freedom made in Milton's "*Aeropagitica*." Here we can quote only a few paragraphs tending to show what freedom of speech meant to its friends. Not a word *can be* found to suggest ex post facto punishment as a substitute for previous restraint.

Milton writes: "Till then, books were ever as freely admitted into the world as any other birth; the issue of the brain was no more stifled than the issue of the womb. * * * * * 'To the pure all things are pure,' not only meats and drinks, but all kinds of knowledge, whether of good or evil; the knowledge cannot defile, nor consequently the books, if the will and conscience be not defiled. For books are as meats and viands are; some of good and some of evil substance; and yet God in that unapocryphal vision said, without exception, 'Rise Peter, kill and eat,' leaving the choice to man's discretion. Wholesome meats to a vitiated stomach differ little or nothing from unwholesome, and best books to a naughty mind are not unapplicable to occasions of evil. Bad meats will scarce breed good nourishment in the healthiest concoction; but herein the difference is of bad books, that they to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate. * * * * All opinions, yea, errors, known, read and collated, are of main service and assistance toward the speedy ascertainment of what is truest. * * * * For those actions, which enter into a man rather than issue out of him and therefore defile not. God uses not to captivate under a perpetual child-

hood of prescription, but trusts him with the gift of reason to his own chooser.

"I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat. Assuredly we bring not innocence into the world, we bring impurity, much rather; that which purifies us is trial, and trial is by what is contrary. That virtue which is but a youngling in the contemplation of evil, and knows not the utmost that vice promises to her followers, and rejects it, is but a blank virtue, not a pure; her whiteness is but an excremental whiteness."

"Since, therefore, the knowledge and survey of vice is in this world so necessary to the constitution of human virtue, and the scanning of error to the confirmation of truth, how can we more safely and with less danger scout into the region of sin and falsity, than by reading all manner of tractates, and hearing all manner of reason?" "Truth and understanding are not such wares as to be monopolized and traded in by tickets and statutes and standards. * * * * Give me the liberty to know, to utter and to argue freely according to conscience above all liberties."

"Though we take from a covetous man all his treasure, he has yet one jewel left; you cannot bereave him of his covetousness. Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make them chaste that come not hither so."

And yet Milton, though he made an unanswerable argument for a totally unabridged freedom of utterance, he could not get wholly beyond all his religious prejudices, and so, although the argument made no provision for it, he found it necessary dogmatically to provide for one conception. "I mean not tolerated Popery and open superstition, which as it extirpates all religious and civil supremacies, so itself should be extirpated." While Milton thus fell short of an unlimited intellectual toler-

ation he yet furnished an immortal statement of reasons to guide us to an unabridged freedom of utterance, and to the invalidating of his own exception thereto.

Spinoza.—To this same period belong the writings of Spinoza. As is to be expected, his viewpoint is different from the others of his time.

He concludes: "We have shown already that no man's mind can possibly lie wholly at the disposition of another, for no one can willingly transfer his natural right of free reason and free judgment, or be compelled to do so. For this reason the government which attempts to control minds is accounted tyrannical, and it is considered an abuse of sovereignty, and a usurpation of the rights of subjects, to seek to prescribe what shall be accepted as true, or rejected as false, or what opinions shall actuate men in their worship of God. All these questions fall within a man's *natural right*, which he cannot abdicate even with his own consent. * * * * The individual justly cedes the right of free action, though not of free reason and judgment. No one can *act* against the authorities without danger to the state, though his feelings and judgment be at variance therewith. He may even speak against them, provided that he does so from rational conviction, not from fraud, anger, or hatred, and provided that he does not attempt to introduce any change on his private authority. * * * * Thus we see how an individual may declare and teach what he believes, without injury to the authority of his rulers, or to the public peace; namely, by leaving in their hands the entire power of legislation *as it effects action*; and by doing nothing against their laws, though he be compelled often to act in contradiction to what he believes, and openly feels to be best. From the fundamental notions of a state, we have discovered how a man may exercise free judgment without detriment to the supreme power; from the same premises we can no less easily determine *what opinions would*

be seditious. Evidently those which by their very nature nullify the compact by which the right of free action is ceded.

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"If we hold to the principle that a man's loyalty to the state should be judged, like his loyalty to God, *from his actions only*—namely, from his charity towards his neighbors—we cannot doubt that the best government will allow freedom of philosophical speculation, no less than of religious belief. I confess that from such freedom inconveniences may sometimes arise, but was any question ever settled so wisely that no abuses could possibly spring therefrom? He who seeks to regulate everything by law, is more likely to arouse vices than to reform them."

From these quotations it appears that Spinoza did not believe in an *unabridged freedom of utterance*. His belief in the psychologic crime of a mere verbal treason, though limited within unusually narrow range, followed logically from his erroneous conception of the sphere of government. Of this he said: "The rights of the sovereign are limited by his power." Since in his theory of government sovereign rights arise out of a cession of freedom of action by the citizen, the opinion which nullified that hypothetical compact could be called treason so long as the sovereign had the power to suppress it as such. It is quite probable, and at least consistent with his theory, that this exception may have been made by Spinoza as a condition of securing tolerance for the rest of the argument in favor of free speech.

However that may be, as Spinoza repudiated the exception to unabridged freedom of utterance, reserved by Milton, so the latter annihilated the one exception made by Spinoza. The premises of each exception were specifically repudiated by the American Declaration of Independence, and American constitutions, and hence these exceptions to unabridged liberty of utterance must also fall. However, the matter that I now wish specially to emphasize is this: The very nature of these arguments for larger freedom is such as utterly

to destroy our judicial assumption that the friends of unabridged freedom of utterance, who framed our Constitutional Guarantees, meant only to provide for ex post facto punishment as a substitute for previous restraint.

Montesquieu.—Some years after the death of Milton came the birth of Montesquieu, who "commanded the future from his study more than Napoleon from his throne" and whose book on "The Spirit of the Laws," "probably has done as much to remodel the world as any product of the eighteenth century, which burned so many forests and sowed as many fields."

In the opinion of Justice O. W. Holmes "Montesquieu had a possibly exaggerated belief in the power of legislation," which alone would not predispose him against censorship. The frequent reference to him in The Federalist and other discussions of the revolutionary period, as well as our constitutions themselves, all show how the thought provoked by his book helped to shape our institutions. This makes it all the more important to ascertain his view upon the province of the state in relation to the liberty of speech and press, because of their quite direct bearing upon the historical interpretation of our constitution.

On the subject of religion he emphasizes the essential difference of human and divine laws, and argues reservedly for general toleration of all religion and concludes: "When the legislator has believed in a duty to permit the exercise of many religions it is necessary that he should enforce also a toleration among these religions themselves. * * * * * *Penal laws ought to be avoided in respect to religion.*"

In the matter of verbal treason Montesquieu seems very exact in his statements, and comprehensive in his thought. Only a few lines will need quoting. He says: "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it of indiscreet speeches. * * * * * Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification, for this depends on

the tone in which they are uttered. * * * * Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established there is an end not only of liberty, but even of its very shadow. * * * * *

"Overt acts do not happen every day; they are exposed to the naked eye of the public, and a false charge with regard to matters of fact may be easily detected. Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subject to revolt incurs the guilt of high treason, because the words are joined to the action; and partake of its nature. It is not the words that are punished, but an action in which words are employed. They do not become criminal, but when they are annexed to a criminal action; everything is confounded if words are construed into capital crime, instead of considering them only as a mark of that crime."

In this evolution to a clearer conception of the issues and the more exact statement of the claims of contending parties, we have now reached the place where unabridged intellectual liberty is defined by excluding from the category of crime every offense founded upon speech, merely as such.

Blackstone and His Critics.—Blackstone was the victim of most of the popular superstitions of his time, from witchcraft down. Of course, he endorsed the current theory of government and consequently the current abridgements of freedom of speech and press. He had no desire or intention to vindicate man's natural right to such liberties *unabridged*, but approved and made declarations of the laws in operation, as he found them. Thus he wrote: "Everything is now as it should be with respect to the spiritual cognizance, and spiritual punishment of heresy; unless perhaps that the crime ought to be more strictly defined, and no persecution permitted, even in the ecclesiastical courts, till the tenets in ques-

tion are by proper authority previous declared to be heretical. Under these restrictions, it seems necessary for the support of the national religion, that the officers of the church should have power to censure heretics, yet not to harass with temporal penalties, much less to exterminate or destroy them."⁷

These spiritual censures and excommunication involved indirect penalties, such as incapacity for "suing an action, being witnesses, making a will, receiving a legacy," etc., and these indirect consequences it would seem that Blackstone approved.

Again he writes: "The (some not unabridged) liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. * * * * * To subject the press to the restrictive power of a licenser, as was formerly done, * * * * is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government. But to punish, as the law does at present, any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government, and religion, the only solid foundations of civil liberty."⁸

It should be apparent from the mere reading that Blackstone was defending and describing only such *limited liberty by permission*, as was then enjoyed in England, and never intended either to define or defend *unabridged* freedom of discussion, as that was contended for by his opponents, whose views, and not Blackstone's, were adopted into our constitutions. For this reason one may well be surprised to find the foregoing statement from Blackstone quoted by American courts as an authority on the meaning of *unabridged* freedom of utterance, which he never mentions.

(7) Vol. IV., *Commentaries*, p. 49.

(8) 4 *Blackstone's Commentaries*, 151.

One of Blackstone's critics, whose book went through more than one edition and of whom it is said:⁹ "he induced the learned commentator (Blackstone) to alter some positions in the subsequent edition of his valuable work," had this to say as to the meaning of unabridged freedom of speech:

"For, though calumny and slander, when affecting our fellow men, are punishable by law; for this plain reason, because an injury is done, and a damage sustained, and a reparation therefore due to the injured party; yet, this reason cannot hold where God and the Redeemer are concerned; who can sustain no injury from low malice and scurrilous invective; nor can any reparation be made to them by temporal penalties; for these can work no conviction or repentance in the mind of the offender; and if he continue impenitent and incorrigible, he will receive his condign punishment in the day of final retribution. Affronting Christianity, therefore, does not come under the magistrate's cognizance, in this particular view, as it implies an offense against God and Christ."¹⁰ Here is again a clear recognition and plain statement, which, like Montesquieu's, demands that actual and material injury shall be the basis of prosecution and not mere speculation about psychologic tendencies.

Mansfield and Kenyon.—Some of our courts, in addition to Blackstone, cite Lords Mansfield and Kenyon as authorities on the meaning of unabridged freedom of utterance, as though their views had been adopted into our constitutions. Concerning these opinions Sir James Fitz James Stephens (after quoting the differing definitions of Lords Mansfield and Kenyon as showing what was the official conception of freedom of the press) says: "Each definition was in a legal point of view complete and accurate, but what the public at large understood by the expression was something altogether different—namely, the right of unrestricted discussion of public affairs."¹¹

(9) Allibone's Dictionary of Authors.

(10) Furneaux's Letters on Toleration, p. 70-71.

(11) Vol. 2 Crim. Law of Eng. p. 349.

In other words the judicial conception of free speech was an abridged free speech, and the popular demand was for an *unabridged* free speech. It should need no argument to prove that the latter, and not the former, was intended to be adopted into American constitutions, and to me it is difficult to account for the contrary opinion, often expressed by our courts, which quite uniformly ignore even the existence of the pre-revolutionary contention against the English official conception, as expressed by the Star Chamber, the English Parliament, Blackstone, Mansfield or Kenyon.

Bishop Horsley, Rev. Robert Hall, and Thomas Jefferson.—The issue between "freedom of the press" in the official English sense, on the one side, and *unabridged* freedom of utterance on the other, was made clear in another English controversy following so close upon the heels of our adoption of the first amendment, as to be fairly considered an English aftermath of that agitation and of the American Revolution.

Bishop Horsley on January 30, 1793, delivered a sermon before the House of Lords wherein he indulged in a severe censure of that "Freedom of dispute" on matters of "such high, importance as the origin of government, and the authority of sovereigns," in which he laments that it has been the "folly of this country for several years past" to indulge. Of the divine right of Kings he declared: "It is a right which in no country can be denied without the highest of all treason. The denial of it were treason against the paramount authority of God."

These premises had recently been repudiated by our Declaration of Independence and by the American constitutions, and by the friends of unabridged freedom of utterance everywhere. One of the conspicuous critics of Bishop Horsley was the Rev. Robert Hall. In arguing against the rightfulness of punishing mere psychologic crimes he laid down the limits of governmental action which must be adhered to if freedom of speech is to remain an *unabridged right*, instead of mere limited liberty by

permission. He said: "The law hath amply provided against *overt acts of sedition and disorder*, and to suppress mere opinions by any other method than reasoning and argument is the height of tyranny. Freedom of thought being intimately connected with the happiness and dignity of man in every stage of his being, is of so much more importance than the preservation of any constitution, that to infringe the former under pretense of supporting the latter, is to sacrifice the means to the end."¹²

In his discourse this reverend author often emphasizes the difference between ideas and overt acts and makes plain over and over that in his view actual injury should be the criteria guilt, and not mere apprehension as to a psychologic tendency. Our constitutional definition of Treason and the guarantees for the right to carry arms for "due process of law," and for unabridged freedom of utterance, show that it was such views as Milton argued for, and as Montesquieu and the Rev. Robert Hall expressed, and not the views of Blackstone, Mansfield, Kenyon, or Bishop Horsley, that our constitutions sought to effectually perpetuate.

Both before and after these utterances by the Rev. Robert Hall, there was most eminent American authority for the same interpretation of the meaning of a "free press." Thomas Jefferson is popularly supposed to have had much to do with framing the Declaration of Independence, and shaping our American institutions. He was a dominant figure in Virginia politics for many years. Those who have familiarized themselves with the religious views of Jefferson,¹³ will not doubt that he encouraged the passage of the Act of the State of Virginia, establishing religious freedom. Although drafted only with a view to theological subjects, yet it contains a summary of incontrovertible reasoning in favor of the general liberty of inquiry and a clear statement as to where the jurisdiction of the state may be rightfully invoked without

abridging intellectual liberty. The Virginia enactment says: "To suffer the Civil Magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty, because, he being, of course, judge of that tendency, will make his opinions the rule of judgment; and approve or condemn the sentiments of others, only as they shall square with or differ from his own. *It is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.*"¹⁴

The Virginia declaration was made in 1786, several years before the adoption of the first amendment to the Federal constitution. The Virginia enactment makes it clear that in their opinion the state has no rightful authority over opinion of any sort, and should not be suffered to interfere until *actual* injury has resulted. It was that conception of "freedom of the press," which America adopted, and not the English tyrants' conception, to which it was opposed, and which originated in the odious Star Chamber found a palatable justification in Blackstone and the English judicial decisions, and an official re-echo in American courts, while engaged in explaining away our constitutional guarantee for an *unabridged* freedom of utterance.

When the Federalist party was defeated because of its enactment of the Alien and Sedition Law, and Thomas Jefferson became President of the United States, he proceeded to pardon every man who had been convicted under this infamous statute. That the penalized utterance *tended* to sedition made no difference to him, which indicates that he, too, endorsed the views of Montesquieu, the Rev. Robert Hall, and the quoted enactment of the Virginia legislature, as being the correct interpretation of the words "unabridged freedom of speech and of the press." Jefferson's own statement as to his conduct is as follows:

(12) An Apology for Freedom of the Press,
18.

(13) See Six Historic Americans.

(14) Quoted from Wortman's, Liberty of the Press, p. 173.

"I discharged every person under punishment or prosecution under the sedition law, because I considered and now consider that law to be a nullity, as absolute and as palpable as if congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its progress in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship the image. It was accordingly done in every instance, *without asking what the offenders had done*, or against whom they had offended, but whether the pains they were suffering were inflicted under the *pretended sedition law*. It was certainly possible that my motives in contributing to the relief of Callendar, and in liberating sufferers under the sedition law, might have been to protect, reward and encourage slander; but they may also have been those which inspire ordinary charities to objects of distress, meritorious or not, or, the *obligation of an oath to protect the constitution*, violated by an authorized act of Congress."¹⁵

This action on the part of President Jefferson was consistent with the issue upon which he was elected, and was required by his own conception of what was meant by an unabridged "Freedom of Speech and of the Press" as applied to verbal treason. His views are thus expressed in his first inaugural address: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it."

These discussions again proclaim the historic view that *unabridged freedom of utterance* means that every man may say with

(15) See 4 Jefferson's complete works, 556, quoted in Booth's v. Rycroft, 3 Wis. 183.

impunity whatever he pleases, being held responsible and punishable only for *actual* resultant injury; that being the only abuse of such freedom which can be penalized.

THEODORE SCHROEDER.

New York City.

CARRIERS—SUIT BY CONSIGNOR.

ATLANTIC COAST LINE R. CO. v. MEINHARD, SCHAUL & CO.

Supreme Court of Georgia, Dec. 24, 1909.

For the value of goods sold and consigned to a vendee, and lost in transit by a common carrier, a right of action exists in the vendor against the carrier, who had received the vendor for them and recited in the receipt that the goods were "to be delivered * * * without unnecessary delay" to the vendee, although the vendee may have paid for the goods and the freight thereon.

The ruling just announced resulted from the general rule that a consignor who has no title to the goods lost may maintain an action for breach of the contract of carriage. See, on the general subject, C. & A. R. R. Co. v. Shea, 66 Ill. 472(5); Great Western R. Co. v. McComas, 33 Ill. 185; Carter v. Southern Ry. Co., 111 Ga. 38, 36 S. E. 308, 50 L. R. A. 354; Southern Ry. Co. v. Johnson, 2 Ga. App. 36, 58 S. E. 333; Ross v. Chicago, R. I. & P. R. Co., 119 Mo. App. 290, 95 S. W. 977; Hooper v. Chicago & S. W. Ry. Co., 27 Wis. 81, 9 Am. Rep. 439.

ATKINSON, J.: Judgment affirmed. All the Justices concur.

Note—Right of Consignor from Whom Title Has Passed to Sue for Loss of Property.—The principal case is a syllabus decision, with no accompanying opinion. The Carter case, which is referred to, did not really involve the question decided, but only whether suit could be brought by the agent of the consignor instead of the consignor himself, and the facts show that the consignor was the owner. But the individual judge discourses upon the question and all of his obiter remarks have been taken notice of. We had supposed that a court using the syllabus decision idea would be less apt to fall into the bad habit of perpetuating *dicta* than other courts, but we do not know. The question was, however, so thoroughly and ably discussed that this journal annotated what the judge said. 51 Cent. L. J. 233. Our annotation there produces authority to the effect that actions by consignees are in tort. We submit hereinafter cases of later dates than our annotation, and it seems to us that the tendency is more and more to make the test of right to sue that of ownership and disregard the form of action. Judge Norton of the St. Louis Court of Appeals, in a case we refer to somewhat at length hereinafter, states the only plau-

sible theory of consignor's right to sue where he has no interest in the property, and he alludes to Missouri statute requiring actions to be brought in the name of real party in interest. We think the learned judge wrong both as to right to sue, and that statute does not control, as is the Indiana idea hereinafter shown. Judge Norton's idea of the statute is that it is met by consignor being the trustee of an express trust; but we think, if the statute is operative at all in the matter, it ought to control absolutely and exclusively. These observations we expect to be understood when the following cases are considered: In *Pratt v. Exp. Co.*, 13 Idaho, 373, 90 Pac. 341, 10 L. R. A. (N. S.) 499, the facts showed a delivery of money by shipper to an express company simply with direction to deliver it to his consignee, and consignee as plaintiff sued therefor. It was consigned to pay an indebtedness by the shipper to plaintiff. The money was stolen from the office of the defendant at the initial point of shipment. The Idaho court, premising, that the question for decision was whether the shipper or consignee should bring the suit reviews a great number of cases, some of which here follow. In Pennsylvania (*Griffith v. Ingledew*, 6 Serg. & R. 429); in England (*Coombs v. R. Co.*, 3 Hurlst. & N. 510); in New York (*Ogden v. Coddington*, 2 E. D. Smith, 317); in Alabama (*Exp. Co. v. Armstead*, 50 Ala. 350) it is ruled, that the test of the right to sue is who is owner of the shipment. The Pratt case cited *Bernstine v. Exp. Co.*, 40 Ohio St. 451, where the shipment was to pay a debt. There the principle was admitted, but the court distinguished the case, holding the shipper had the right to sue, because as the creditor had not directed him to send by express and his duty was to pay in person, the loss primarily fell on the debtor. The Idaho case, in which the consignee sued, held in his favor, because this, operating to ratify the delivery to the express company, released the debtor and made a bar in favor of the express company.

In *Gratiot St. Warehouse Co. v. R. Co.*, 124 Mo. App. (St. L. Ct. of App.) 545, Judge Norton said "it is now well settled in the law of this and many other states, following the early case of *Blanchard v. Page*, 8 Gray, 281, where Judge Shaw announced the principle that even though the consignor had no property or interest in the goods, he is a proper plaintiff in an action for a breach of the contract on the ground that he has an interest in the contract. "The doctrine proceeds upon the contractual priority existing between the original parties which operates a cause of action, after the carrier's service is performed thereunder, in favor of the carrier and against the consignor for the freight, and for this reason conversely renders the shipper, although not the owner of the goods, a party in interest to the contract." This looks like an intangible abstraction and a something which is *res alios acta* so far as the consignee's rights are concerned, for it must be held that, if the consignor has a right to sue, the judgment in the suit ought to be a bar. If it is lost the consignee could not complain, and if it is won, he has to trust to the consignor for a proper adjustment of the matter. Also, though the learned judge says this principle is well settled in Missouri and other states and he cites four prior decisions of Missouri courts in support, we find in the same volume that he writes in a case by Kansas City Court of Appeals, in which it does not appear

that court feels the like confidence. *Norris & Steadley v. R. Co.*, 124 Mo. App. 16.

In that case the contention was made that the consignees were the owners and plaintiffs' consignors were not proper parties, and this was answered by the court saying the plaintiff having shipped the goods to be paid for on arrival were the owners. This latter court, the same judge writing the opinion for the same bench, just one year before, had the same question up: *Ross v. R. Co.*, 119 id. 290. There it is said: "But there are other respectable authorities that hold to the view that a person having no interest in the property shipped, if he be the consignor and pays the charges, may maintain an action against the carrier for loss or damage to the same during transportation. Our own Supreme Court holds: 'Suit on a transportation contract is properly brought in the name of the consignor, whether he be the owner or not. *Atchison v. Rail-way*, 80 Mo. 213.' We believe, however, this is the only case found in our reports that has any direct bearing on the question." This case is very scant, but the petition sounds in tort, and all that is said is: "Atchison, in whose name the contract for the transportation of the cattle was made, was the proper party to sue, and the petition sufficiently shows that he was the consignor. Who the owner was is immaterial. *Harvey v. Railroad*, 74 Mo. 538." Going back to that case we find that it held that the real owner could not sue where one having possession of a race-horse of plaintiff, shipped him to Philadelphia, at a reduced valuation to be entered in the races, but not to plaintiff as consignee. The case merely held that as the owner did not under his contract with the shipper "have the right of possession of the horse injured," the party having such right must sue. That contract constituted the shipper a bailee having a special property, and he, of course, could sue, whether the general owner might or not.

In *Chicago & E. I. R. Co. v. Boggs*, 134 Ill. App. 348, a much later case than the Illinois cases cited by the principal case, plaintiff, seller, shipped f. o. b. a car load of corn, which arriving in a damaged condition the consignee, who only agreed to accept same if up to a certain grade, rejected the shipment. The court said, in answer to the contention, that only the purchaser had any right of action against the carrier: "The corn having failed to come up to grade at Nashville, and the purchaser not asserting any rights under his contract of purchase and bill of lading, which appellee had indorsed and delivered to it, the sale was never consummated, and the right of action for damages against the party responsible therefor is in the appellee." It thus looks like the Illinois rule is not greatly the way of the principal case.

In *St. Louis & S. F. R. Co. v. Stone* (Kans.), 97 Pac. 471, the right of action in shipper was sustained, expressly on the theory that there was not a consummated sale to the consignees by delivery on board the cars under the facts of the case. It was upon this the case was distinguished from those where title passed by such delivery.

In *Grenvitz v. Weir*, 112 N. Y. Supp. 557, 127 App. Div. 352, the following very brief opinion is by Judge Gaynor: "The plaintiff has recovered judgment for \$167.50 for goods shipped by him by the defendant express company and lost by it. It is enough that the plaintiff did not own the goods.

He received them by express for inspection and to be returned to the sender within five days if they did not suit him, and he returned them by the defendant. The person to bring the suit is the owner. *Sweet v. Barney*, 23 N. Y. 335; *Knilder v. Ellison*, 47 N. Y. 36. 7 Am. Rep. 402." This case is an excellent illustration of how foolishly the consignor idea would work. A party of that kind might be a very irresponsible individual, and, at all events, any consignor, who would be merely suing for another's benefit, would not be supposed to act with as much diligence in doing a favor for another, as he would act in his own behalf.

In a still later New York Supreme Court case, sitting in appellate division, a *per curiam* opinion it was squarely ruled that where the presumption that title passes to the consignee exists, and there is no proof to rebut this, the consignor has no right of action. *Wertheimer v. Wells Fargo & Co.*, 112 N. Y. Supp. 1062.

In *Mattheson v. Southern Ry.*, 79 S. C. 155, 60 S. E. 437, it was held that where delivery was to be made at destination, the title and action for loss remains with the seller. In the opinion it is said: "The general rule is that delivery to the carrier is delivery to the consignee, and on such delivery the title passes to consignee; the goods then being at the consignee's risk, he has the right of action for their loss."

In *Cleveland C. C. & St. L. Ry. Co. v. Moline Plow Co.*, 13 Ind. App. 225, 41 N. E. 480, the matter is ruled by force of statute requiring suit to be in the name of the real party in interest, and thereunder it is held that the consignee must sue unless the presumption of title in him is rebutted. Therefore it was held that a complaint by a consignor against a carrier for misdelivery stated a cause of action by alleging that certain machinery "was then and always has been the property of the plaintiff, which defendant agreed to carry." *Cleveland, C. C. & St. L. R. Co. v. Pitts & Co.*, 33 Ind. App. 564, 71 N. E. 685. See also *Union Pac. R. Co. v. Metcalfe*, 50 Neb. 452, 69 N. W. 961. If he ships to his own order he is presumed, in the absence of evidence to the contrary, to have intended to retain the title. *Missouri Pac. R. Co. v. Lau*, 57 Neb. 559, 78 N. W. 291.

In Minnesota the right of action in owner appears to be distinctly recognized. It was there contended that "the consignor cannot maintain the action and that the consignee alone can do so," and the case cited in support of this so held, with the proviso that the presumption of ownership was rebuttable and in the case at bar this was rebutted. *Jarrett v. R. Co.*, 74 Minn. 477, 77 N. W. 304. The theory of ownership being the test of who should sue was applied in Tennessee Supreme Court to the case of a merchant shipping goods to be sold on commission. The court said: "The apples were consigned to Kaiser Bros., to be sold by them on commission and they were not sold to them, and the fact that they were thus consigned, did not vest the title in them. Until sold the title to the apples was in Deakins and at no time was it in Kaiser Bros." Therefore the consignor was held to be the proper party plaintiff. *Railroad v. Deakins*, 107 Tenn. 522, 64 S. W. 477.

C.

HUMOR OF THE LAW.

"President Roosevelt was always fond of telling stories about his experiences in the New York Assembly," said a member of Congress the other day, who was a frequent visitor at the White House in the evening.

"I recall one that he told with much amusement. Colonel Murphy, of New York, was chairman of a committee which was holding public hearings. One day the Colonel lunched plentifully and well. When he returned to the committee room a slim little chap addressed the committee. The colonel fell asleep and woke up when the little lawyer was eloquently summing up his case. The colonel blinked, rubbed his eyes and shouted:

"'You have been here before. What do you mean by making two speeches before this committee?'

"'I have not appeared before your honorable committee before,' protested the little lawyer.

"'Don't contradict the chair,' yelled the colonel. 'Sit down.'

"The next man to address the committee was a big-voiced fellow who spoke loudly and feelingly of the downtrodden millions. The colonel listened for a few moments and then began to doze and finally to snore. He was aroused from his slumbers by a particularly eloquent outburst. The colonel awoke with a start.

"'You have been here before,' he shouted.

"'I haven't,' replied the speaker, in equally loud tones.

"'Don't you dare contradict the chair,' roared Murphy.

"'Well, I haven't been here before,' persisted the speaker.

"'Put him out,' ordered Murphy. "The committee stands adjourned."

Many stories are current in legal circles regarding ex-Judge W. T. Wallace, one of the best known jurists in the history of San Francisco, but here is a new story vouched for by Billy Barnes, at one time district attorney. It runs thus:

"Wallace was examining a candidate for admission to the bar. All the questions had been satisfactorily answered and the lawyer-to-be had passed so brilliantly that Wallace decided to put a simple question to terminate the ordeal. Gazing benignly at the young man, he asked.

"What is the liability of a common carrier?"

"Although lawyers the world over and from time immemorial have wrestled with this problem, though millions of words have been taken into the record of various cases in which this unanswerable question was involved, the fledgling calmly eyed the judge and at last solemnly replied:

"Your honor, I must beg you to withdraw that question. I did know the answer, but unfortunately I have forgotten."

"For a minute Wallace eyed the young man, then turning to the lawyers who were grouped around him, remarked:

"Gentlemen, this is a sad case, in fact a calamity. The only living man who ever knew the liability of a common carrier has forgotten."

WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
Resort, and of all the Federal Courts.**

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1. Abatement and Revival—Premature Action.—Where a plea of nonaccrual of a cause of action is sustained, the action should be abated, though the right accrues before trial.—*Jones v. Dyer*, Ark., 123 S. W. 757.

2.—Substitution of Parties.—Where a husband, who was sole plaintiff, died pending an action relating to land, his widow may be substituted as plaintiff on suggestion of his death and of her interest.—*Bale v. Bale*, Ill., 90 N. E. 233.

3. Accident Insurance—Renewal of Policy.—A mere soliciting agent had no authority to continue an accident policy in force by issuing a renewal receipt to insured without payment of the premium due.—*Pacific Mut. Life Ins. Co. v. Carter*, Ark., 123 S. W. 384.

4. Adoption—Domicile.—That a foreign adopted child was not domiciled in Tennessee at the time of the death of his foster parent, and that the status of the parent's brother as his heir was fixed at the parent's death, could not preclude the adopted child from asserting the principle of comity in support of his adoption rights.—*Finley v. Brown*, Tenn., 123 S. W. 859.

5. Adverse Possession—Occupancy—Occupancy to a division fence, though erected by mistake as to the true boundary line, held to constitute adverse possession.—*Bayhouse v. Urquides*, Idaho, 105 Pac. 1066.

6. Animals—Fences.—Only substantial compliance with Rev. St. 1890, sec. 3295, is required in the construction of a fence sufficient to turn swine, so that an instruction that plaintiff could not recover therefor, if any of the posts were more than 16 feet apart, was properly refused.—*Sharp v. Quincy, O. & K. C. Ry. Co.*, Mo., 123 S. W. 507.

7. Assault and Battery—Self-Defense.—Though defendant's purpose in entering prosecutor's house was unlawful, where he abandoned such purpose, and sought to escape, he may resist prosecutor's pursuit and assault by force, and plead self-defense.—*Cox v. State*, Tex., 123 S. W. 696.

8. Attachment—Debt Fraudulently Contracted.—Failure to accept and use a livery rig as agreed held a mere breach of contract which would not support an attachment on the ground of a debt fraudulently contracted.—*Kilpatrick v. Inman*, Colo., 105 Pac. 1080.

9. Attorney and Client—Undue Influence.—The presumption of an attorney's undue influence in case of a contract with his client does not apply where he openly assumes a hostile attitude to his client, nor to a contract creating the relation and fixing compensation.—*Cooley v. Miller & Lux*, Cal., 105 Pac. 981.

10. Bankruptcy—Right of Trustee.—A bankrupt's trustee takes title to the bankrupt's property, including that conveyed in fraud of creditors subject to outstanding equities to which it was subject in the bankrupt's hands.—*Blake v. Meadows*, Mo., 123 S. W. 868.

11. Banks and Banking—Receiving Deposits Illegally.—Where a bank remained open for the transaction of business and the reception of deposits, the law would presume that the presi-

dent assented to the reception of such deposits as were shown by the bank's books.—*Parrish v. Commonwealth*, Ky., 123 S. W. 839.

12. Bastards—Legitimization.—An illegitimate child, legitimized by the subsequent marriage of its parents in accordance with laws of the place where the marriage took place and the parents were domiciled, is thereafter legitimate everywhere.—*Finley v. Brown*, Tenn., 123 S. W. 359.

13. Benefit Societies—Validity of By-Laws.—In the absence of a statute, a mutual insurance association may provide against liability under a policy if the insured should commit suicide, whether sane or insane.—*Kunse v. Knights of the Modern Maccabees*, Ind., 90 N. E. 89.

14. Bills and Notes—Consideration.—Where a mother signed a note for money borrowed to aid her sons in business, it was not essential to bind her as a principal contractor that the money should be paid over to her; but it was sufficient that it was paid to one of her sons at her direction.—*Vandeveenter v. Devis*, Ark., 123 S. W. 666.

15.—Mistake of Law.—That a wife signed a mortgage note on statement that it did not bind her personally, but only her interest in the land, it was no defense unless the mistake was mutual.—*Grant v. Isett*, Kan., 105 Pac. 1021.

16.—Negotiability.—A stipulation in a conditional vendee's note that partial payments to any amount less than the price shall be taken as rent held to destroy the negotiability of the instrument.—*Gilpin v. People's Bank*, Ind., 90 N. E. 91.

17. Boundaries—Resurvey.—The purpose of a resurvey subsequent to taking title by purchasers and settlers is to ascertain the lines of the original survey and the location of the original boundaries as established.—*Bayhouse v. Urquides*, Idaho, 105 Pac. 1066.

18. Brokers—Commissions.—An agent or owner cannot list property with a broker, and, after he has procured a purchaser at the agreed price, sell the land himself to such purchaser, and refuse to divide the commission with the broker.—*Dalke v. Slyver*, Wash., 105 Pac. 1031.

19. Building and Loan Associations—Borrowing Members.—A borrowing member of a building and loan association cannot avail himself of an agreement as to the number of payments that will mature his stock, not contained in his bond and mortgage.—*Henry v. Continental Building & Loan Ass'n*, Cal., 105 Pac. 960.

20. Carriers—Act of God.—Act of God resulting in further delay of a cattle shipment held no defense to the carrier's liability, where, but for previous delay, the shipment would have passed the point of obstruction before it occurred.—*Chicago, R. I. & P. Ry. Co. v. Miles*, Ark., 123 S. W. 775.

21.—Carriage of Live Stock.—A carrier of live stock must exercise ordinary care to prevent injury from the natural propensities of the animals, and is only exempt from liability from injuries so caused where such cause was the proximate cause of the injury.—*Galveston, H. & S. A. Ry. Co. v. Jones*, Tex., 123 S. W. 737.

22.—Passenger Elevators.—A company operating a passenger elevator in an office building, held to be a common carrier of passengers.—*Cooper v. Century Realty Co.*, Mo., 123 S. W. 848.

23. Certiorari—Scope of Review.—The scope of the writ of review is to review the determination of the lower tribunal when it has exceeded its jurisdiction or exercised the same erroneously in making such determination, and original relief cannot be secured thereby.—*Elmore v. Tillamook County*, Or., 105 Pac. 909.

24. Chattel Mortgages—Rights of Mortgagee.—Where a chattel mortgagee is lawfully in possession, and has irregularly foreclosed the mortgage and sold the property to another, the mortgagor may treat the transaction as a conversion of the property.—*Swank v. Elwert*, Or., 105 Pac. 901.

25. Conspiracy—Inducing Purchase of Worthless Stock.—In a prosecution for criminal conspiracy by inducing the purchase of worthless mining stock by false representations as to its value, proof of the falsity of the representations was essential to a conviction.—*State v. Blake*, Utah, 105 Pac. 910.

26. Constitutional Law—Drains.—Rev. St. 1899, c. 122, as amended by Laws 1905, p. 180, relat-

ing to drainage of swamp and overflow lands, held not violative of U. S. Const. Amend. 14 and Const. art. 2, sec. 30, relating to due process of law.—*State v. Bugg*, Mo., 123 S. W. 827.

27.—**Drinking Intoxicants.**—An ordinance against the drinking of intoxicating liquors in stairways, areaways, streets, alleys and sidewalks held void as invading personal liberty.—*City of Carthage v. Block*, Mo., 123 S. W. 483.

28.—**Execution and Probate of Wills.**—The rules imposed by statute for the probate of wills are obligatory on the courts not only as to the quantum of proof necessary to authorize probate, but also as to the particulars attending execution.—*In re Noyes' Estate*, Mont., 105 Pac. 1017.

29.—**Parole of Prisoners.**—The parole act, effective July 1, 1899, held to entitle a paroled prisoner to a hearing before the board of pardons upon his reimprisonment by the penitentiary warden, so that section 4 did not deprive relator, a paroled prisoner, of his liberty without due process of law.—*People v. Strassheim*, Ill., 90 N. E. 118.

30. **Corporations—Right to Hold Real Estate.**—A foreign corporation held not entitled to take title to real estate, where a similar domestic corporation is prohibited from so doing by the statutory or constitutional law.—*Proctor v. Board of Trustees of Methodist Episcopal Church, South*, Mo., 123 S. W. 862.

31.—**Trustees.**—Where a corporation was without a board of trustees because of a deadlock among the stockholders, one faction was not responsible for failure to rebuild and operate the plant after its destruction by fire.—*Weymouth v. Oudin*, Wash., 105 Pac. 1027.

32.—**Ultra Vires.**—The doctrine of ultra vires cannot be invoked to defeat liability for an injury through negligence.—*Burke v. State*, 119 N. Y. Supp. 1089.

33. **Costs—Executor and Administrator.**—An administratrix in a state having given bond as such is not required to give bond for costs in an action in her fiduciary character, though a nonresident; Kirby's Dig. secs. 959, 960, 961, not being applicable.—*Warren & O. V. R. Co. v. Waldrop*, Ark., 123 S. W. 792.

34. **Courts—Presumption.**—Where the record is silent with respect to any fact necessary to give a court jurisdiction, it will be presumed that the court acted within its jurisdiction unless the contrary appears on the face of the record.—*Flowers v. Reece*, Ark., 123 S. W. 773.

35. **Covenants—Incumbrances.**—A covenant against incumbrances is breached by the unexpired term of a valid subsisting lease at the date of the execution of the deed.—*O'Connor v. Enos*, Wash., 105 Pac. 1039.

36.—**Seisin.**—As a covenant of seisin of an indefeasible estate in fee simple, which is broken when made, runs with the land, a subsequent grantee can sue the original covenantor for damages for a breach.—*Coleman v. Luckssinger*, Mo., 123 S. W. 441.

37. **Criminal Evidence—Reception of Evidence.**—Where a witness was asked a question as to whether another witness owned a pistol, the question was not objectionable as depriving defendant of the privilege of proving by the witness himself that he did not own a pistol, since it would not disqualify him to testify, and, although it did disqualify him, it would not render inadmissible testimony of other witnesses who were qualified.—*Deckard v. State*, Tex., 123 S. W. 417.

38.—**Testimony of Accomplice.**—The manner and means of inducing an accomplice to testify with a view to a lighter punishment are matters for argument to the jury, but it would be error to point out those facts, and tell the jury to specially consider them in weighing his testimony.—*State v. Shelton*, Mo., 122 S. W. 732.

39. **Criminal Trial—Instructions.**—In a prosecution for carrying a pistol, where accused's reputation as a peaceable citizen was admitted, and not denied, it was not reversible error to refuse an instruction that his reputation was admitted.—*Hines v. State*, Tex., 123 S. W. 411.

40.—**Physical Examination of Accused.**—In a murder case, held, that the court should, on accused's motion, allow accused to be taken from jail for an X-ray examination to show a fact which if proved would tend to strengthen

his testimony.—*Browder v. Commonwealth*, Ky., 123 S. W. 328.

41.—**Plea in Abatement.**—Where a nolle prosequi had been entered on an indictment for a felonious assault, there was no error in overruling a plea of such indictment in abatement to an information for the same assault charged as a misdemeanor.—*State v. Hussey*, Mo., 123 S. W. 485.

42.—**Self-Defense.**—In a prosecution for killing the son of S. in a difficulty over the possession of a barn, evidence that S. had been advised by an attorney that he could hold the barn held inadmissible.—*Smith v. State*, Tex., 123 S. W. 698.

43. **Damages—Measure.**—In a suit for breach of a contract to use a livery rig to transport defendant to a certain place, a judgment for plaintiff for the entire contract price was excessive, since it allowed plaintiff more profits than he could have made had the trip been made.—*Kilpatrick v. Inman*, Colo., 105 Pac. 1080.

44.—**Personal Injuries—Recovery.**—Recovery cannot be had for expenses incurred in nursing plaintiff, on testimony merely that trained nurses were employed, without any evidence as to the time of such employment, who employed them, or what they were paid.—*Graefe v. St. Louis Transit Co.*, Mo., 123 S. W. 885.

45.—**Stipulation in Lease.**—A stipulation in a lease held not to stipulate any damages for the lessor's breach of a covenant therein, or authorize him to determine what sum should be allowed for such breach.—*B. Roth Tool Co. v. Champ Spring Co.*, Mo., 123 S. W. 513.

46. **Dismissal and Non-suit.**—Dismissal as to Co-party.—Where a surety bond was joint and several, so that one having a right of action thereon could sue the principal and sureties or either of them, a discontinuance as to the principal in an action against him and the sureties was not a discontinuance as to the sureties.—*Stevenson v. Stunkard*, Ind., 90 N. E. 106.

47. **Drains—Proceedings According to Law.**—Dismissal of drainage proceedings by the board of commissioners held "proceeding according to law" in accordance with the order of the circuit court remanding the proceedings on the repeal of the drainage law without a saving clause.—*Zintsmaster v. Alkin*, Ind., 90 N. E. 82.

48. **Electricity—Trespassers.**—One killed by coming in contact with a live electric wire defectively insulated held, in his relation to the electric company, a trespasser, relieving the company from liability.—*Rodgers' Adm'r v. Union Light, Heat & Power Co.*, Ky., 123 S. W. 293.

49. **Eminent Domain—Damages Recoverable.**—Where defendant's land was taken for a railroad right of way, after which defendant sold the same, an instruction that he could only recover such damages as accrued between the building of the embankment and the time of the sale was erroneous.—*Boise Valley Const. Co. v. Kroeger*, Idaho, 105 Pac. 1070.

50.—**Measure of Damages.**—In condemning a right of way for a telegraph line, the measure of damages held to be the value of the land actually occupied by the poles and the decrease in value of the land between the poles from the right of the telegraph company to use it jointly with the owner for repair and construction.—*Illinois Telegraph News Co. v. Meine*, Ill., 90 N. E. 129.

51.—**Water Companies.**—A water company held not authorized to condemn a right of way for a stub switch, connecting its plant with a railroad, to be used by the railroad company under its control, and to become a constituent part of its railway system.—*Kinney v. Citizens' Water & Light Co. of Greenwood*, Ind., 90 N. E. 129.

52. **Equity—Statute of Limitations.**—When a statute of limitation applied to a suit in equity, delay in commencing the suit for a period less than that of the statute is not a reason for dismissing the proceeding, unless accompanied by other circumstances.—*Marsh v. Lott*, Cal., 105 Pac. 968.

53. **Estoppel—Married Women.**—A married woman held not estopped from asserting the invalidity of the deed of her expectancy as heir of her father to secure separate debts of her

husband.—*Taylor v. Swafford*, Tenn., 123 S. W. 350.

54. **Evidence—Commercial Reports.**—Commercial reports as to a husband's credit held inadmissible as against the wife to show that his creditors extended credit on the faith of his ownership of the land in controversy.—*Blake v. Meadows*, Mo., 123 S. W. 868.

55. **Qualification of Expert.**—An expert witness as to the value of cattle held competent to testify to the value of the cattle on their arrival at destination in an injured condition, and in the condition they would have been in had they not been injured.—*Galveston, H. & S. A. Ry. Co. v. Jones*, Tex., 123 S. W. 737.

56. **Executors and Administrators—Sale of Land.**—Purchaser at sale of land for payment of debts of decedent by order of court without jurisdiction held to acquire no title.—*Scott v. Royston*, Mo., 123 S. W. 454.

57. **Waiver of Right to Administer.**—Where a widow signed a waiver of her right to administer the estate of her deceased husband, and she soon thereafter went to another state to reside, and thus became disqualified to act as administratrix, the court would not set aside her waiver.—*Becker v. Orr*, Ill., 90 N. E. 181.

58. **False Pretenses—Elements of Offense.**—Whether false pretenses were calculated to deceive so as to constitute a crime must be determined in connection with the capacity of the person defrauded.—*McDowell v. Commonwealth*, Ky., 123 S. W. 313.

59. **Fire Insurance—Incumbrances.**—Where a fire policy does not stipulate against incumbrances, the insurer's obligation is not impaired by the placing of an incumbrance on the property during the life of the policy.—*Cooper v. American Cent. Ins. Co.*, Mo., 123 S. W. 497.

60. **Fixtures—Heating Plant.**—A heating plant placed in a building under a contract by the contractor held a fixture.—*Peck-Hammond Co. v. Walnut Ridge Dist.*, Ark., 123 S. W. 771.

61. **Fraud—False Representations.**—A party inducing another to contract in reliance on estimates or opinions based on facts known to be false cannot escape responsibility by claiming he was only declaring an opinion.—*Henry v. Continental Building & Loan Ass'n*, Cal., 105 Pac. 960.

62. **Frauds, Statute Of—Agreements Not to be Performed Within Year.**—A verbal contract to superintend the making and gathering of a crop of cotton held not within the statute of frauds.—*Valley Planting Co. v. Wise*, Ark., 123 S. W. 768.

63. **Goods to be Manufactured.**—A contract for the manufacture of articles on a special order not for the general market is not for the sale of goods within the statute of frauds.—*Courtney v. Bridal Veil Box Factory*, Ore., 105 Pac. 896.

64. **Parol Contract to Convey Land.**—Where the promisor in a parol contract to convey land in consideration of the promisee rendering personal services refused to perform after the rendition of personal services, the law raised an implied contract to pay for such services.—*Graham v. Graham*, 119 N. Y. Supp. 1013.

65. **Part Performance.**—If tenants take possession under an oral lease and plow, cultivate, and summer fallow the land, it is a part performance taking it out of the statute.—*O'Connor v. Enos*, Wash., 105 Pac. 1039.

66. **Fraudulent Conveyances—Right to Plead Fraud.**—Creditors of a husband, with knowledge that the purchase price of certain land, the title to which was taken in the name of the husband, was furnished by the wife and her mother, held not entitled to claim that a subsequent conveyance by the husband to the wife was a fraud on them.—*Blake v. Meadows*, Mo., 123 S. W. 868.

67. **Guardian and Ward—Nature of Office of Guardian.**—Guardians and curators are creatures of the law, and are statutory officers of the court, and have no inherent powers, but only such as are prescribed by statute.—*Scott v. Royston*, Mo., 123 S. W. 454.

68. **Homestead—Abandonment.**—Where a widow remarried before a proceeding to sell her deceased husband's land, and moved to a farm owned by her second husband, there was an abandonment of her homestead in the land

of her first husband.—*Stobaugh v. Irons*, Ill., 90 N. E. 272.

69. **Husband and Wife—Estoppel in Puis.**—A married woman held not subject to the full application of the doctrine of estoppel in pais.—*Blake v. Meadows*, Mo., 123 S. W. 868.

70. **Torts of Wife.**—The common-law rule that the husband is liable for the slanderous words uttered by his wife held not abrogated by the married woman's act.—*Jackson v. Williams*, Ark., 123 S. W. 751.

71. **Improvements—By Persons Without Title.**—One without title to a lot could acquire no right to compensation by improving it.—*Maclejewska v. Jarzombek*, Ill., 90 N. E. 231.

72. **Injunction—Damages Recoverable for Wrongful Issuance.**—For a wrongful injunction against the working of a coal mine by lessees, they are entitled to recover on the bond such damages as were the direct and proximate result of the service of the writ.—*Silka v. Quinn*, Colo., 105 Pac. 1104.

73. **Innkeepers—Rule of Liability.**—The rules of liability between innkeepers and their guests held inapplicable where one, not a guest at a hotel, left a valise there with the person in charge of the coatroom.—*Bean v. Ford*, 119 N. Y. Supp. 1074.

74. **Insane Persons—Release.**—Where mental incapacity is pleaded to avoid a release, the failure to disaffirm within a reasonable time after being restored to competency to contract must be specially pleaded by the other side to be available.—*Alamo Dressed Beef Co. v. Yeargan*, Tex., 123 S. W. 721.

75. **Judgment—Conformity to Pleadings.**—A judgment cannot be entered upon a petition or answer which manifestly discloses no cause of action or grounds of defense, though its verity be admitted or proved, even though the opposite party did not except to the pleading.—*Singelton v. Goeman*, Tex., 123 S. W. 436.

76. **Persons Bound by Decree.**—A purchaser by a parol sale of an heir's interest in land should appear and, under a power of attorney from the heir authorizing him to receive his interest, claim distribution on final settlement, and, failing to do so, he is bound by the decree.—*Cooley v. Miller & Lux*, Cal., 105 Pac. 981.

77. **Landlord and Tenant—Constructive Eviction.**—If the plaster of rented premises was in such bad order as to interfere seriously and with the beneficial use of the premises, there was an eviction though the plaster did not actually menace the safety of the tenants.—*Vromania Apartments Co. v. Goodman*, Mo., 123 S. W. 548.

78. **Enforcement of Lien.**—In an action against a landlord by the tenant for conversion of the property of the tenant by an unlawful enforcement of the lien of the landlord for rent on the property, the landlord can offset his lien for rent against the damages of the tenant.—*Swank v. Elwert*, Ore., 105 Pac. 901.

79. **Lease.**—A bare acceptance by a landlord of a surrender of a prior lease and the granting of a new lease to the tenant, held not a waiver of liability existing at the time against the tenant on covenants of the lease.—*Herboth v. American Radiator Co.*, Mo., 123 S. W. 533.

80. **Option to Renew Lease.**—Where a lease provides for an additional term at an increased rental, and the tenant holds over, if he pays such increased rental, it is evidence that he has exercised the option to lease for an additional term.—*Carhart v. White Mantel & Tile Co.*, Tenn., 123 S. W. 747.

81. **Licenses—Occupation.**—The state under police power may license and regulate chattel mortgage and salary loan brokers.—*Sanning v. City of Cincinnati*, Ohio, 90 N. E. 125.

82. **Life Estates—Acquisition of Outstanding Claim.**—That a mortgagee was the guardian in socage of the remainderman in fee in mortgaged property does not render the purchase by him absolutely void; but the mortgages being also the life tenant, and so bound to discharge the interest on the mortgage, the purchase was voidable at the election of his infant ward.—*Jefferson v. Bangs*, N. Y., 90 N. E. 109.

83. **Master and Servant—Assumption of Risk.**—One engaged in constructing a railroad track held not entitled to recover for an injury sustained by the derailment of a train, because the construction had not proceeded far enough

to make the track safe.—Southern Ry. Co. v. Buffkins, Ind., 90 N. E. 98.

84.—Assumption of Risk.—A servant assisting in removing a shaft from a pulley held not to assume, as a matter of law, the risk of injury resulting from a fellow servant striking the shaft with a scantling pursuant to the order of the foreman.—Texas & P. Ry. Co. v. Jones, Tex., 123 S. W. 434.

85.—Defective Appliances.—A defect in an appliance procured by a master from a reputable dealer, which ordinary care in the course of reasonable inspection will disclose, is not a latent defect, but is a defect for which the master, in the performance of his duty of inspection, is responsible.—Alamo Dressed Beef Co. v. Yeargan, Tex., 123 S. W. 721.

86.—Duty to Warn Servant.—Where the business is a dangerous one, and the master, with notice of the servant's ignorance of the danger, fails to properly warn him, he cannot escape responsibility because he used the utmost care to reduce the danger.—Pigeon v. W. P. Fuller & Co., Cal., 105 Pac. 976.

87.—Frightening Traveler's Horse.—The driver of a team so decorated as to frighten plaintiff's horse and injure his wife held defendant's servant, and not an independent contractor.—Patton-Worsham Drug Co. v. Drennon, Tex., 123 S. W. 705.

88.—Injury to Brakeman.—A brakeman, injured by the pulling out of a defective hand-hold, held not charged with notice thereof, unless he had actual knowledge thereof, or must have obtained such knowledge in the ordinary course of his duty.—Missouri, K. & T. Ry. Co. of Texas v. Hawley, Tex., 123 S. W. 726.

89.—Railroad Trackman.—A railroad trackman must not place himself in such a position that he cannot see an approaching train or permit himself to be so engrossed as will prevent him from protecting himself, and if he does so, no recovery can be had for his death.—Degonia v. St. Louis, I. M. & S. Ry. Co., Mo., 123 S. W. 807.

90.—Rules of Master.—Rules of a master violated with its knowledge held abrogated, so as not to affect right to recover for injury to a servant.—St. Louis, I. M. & S. Ry. Co. v. York, Ark., 123 S. W. 376.

91.—Safe Place to Work.—Defendant railroad, in permitting grass to grow up around rails and conceal them from view, was liable for injuries to a section hand falling over them while carrying ties.—Texas & P. Ry. Co. v. Tuck, Tex., 123 S. W. 406.

92. Mechanic's Lien.—Notice of Lien.—The date of furnishing materials for a building as given in the notice of lien therefor, cannot, by extrinsic evidence, be carried back to a prior date, so as to give the lien priority over another lien on the premises.—May v. Mode, Mo., 123 S. W. 523.

93. Mines and Minerals—Abandonment.—Senior locator may abandon right in land and render the ground subject to relocation before expiration of time within which annual labor must be performed.—Swanson v. Kettler, Idaho, 103 Pac. 1059.

94. Mines and Minerals—Certificate of Location.—An amended certificate, filed because of defects in the original location certificate of a mining location, may not include territory so as to injuriously affect intervening rights.—Washington Gold Min. & Mill. Co. v. O'Laughlin, Colo., 105 Pac. 1092.

95.—Fraudulent Entryman.—By a fraudulent entry on coal land, a claimant never acquired any rights to the premises, and his alleged title was void ab initio, and he acquired no superior title to a coal mine thereon pending cancellation of his entry, and his obtaining of an injunction on the strength of his supposed rights before his entry was canceled was as much of a fraud on the court's jurisdiction as was his entry a fraud on the government.—Baldwin Star Coal Co. v. Quinn, Colo., 105 Pac. 1101.

96. Money Received—Money Obtained by False Representations.—Where defendant induced plaintiff to pay for certain land contracts by fraudulent representations as to the value of the land, etc., made in order to defraud plaintiff, plaintiff could recover, as for money had and received, the money paid defendant under the contracts.—Steel v. Brazier, Mo., 123 S. W. 477.

97. Municipal Corporations—Contracts.—Where council by ordinance appropriate money and order directors of public safety to enter into contracts, a particular contract made in conformity with the ordinance need not be approved by the council.—City of Akron v. Dobson, Ohio, 90 N. E. 123.

98.—Frightening Traveler's Horse.—An individual who does anything to frighten a traveler's horse is liable for any damages which may result from the fright either to the owner or to any person whom the frightened horse may injure.—Patton-Worsham Drug Co. v. Drennon, Tex., 123 S. W. 705.

99.—Intoxicating Liquors.—An ordinance against the drinking of intoxicating liquors on the streets, alleys, and sidewalks of the city is within the general police power given to cities of the third class by Rev. St. 1899, § 5834 (Ann. St. 1906, p. 2949).—City of Carthage v. Block, Mo., 123 S. W. 483.

100.—Negligence.—Where the proximate cause of decedent's death was an attack of vertigo, in connection with the city's negligence in permitting the boulevard of a street to be obstructed by railroad rails on which decedent fell, the city was liable.—Woodson v. Metropolitan St. Ry. Co., Mo., 123 S. W. 820.

101.—Rebate of Special Assessments.—An ordinance providing for the rebate of special assessments held to relate only to the case where the owner at the time the assessment was paid was the owner at the time of the payment into the treasury of the money to be rebated.—Savage-Schofield Co. v. City of Tacoma, Wash., 105 Pac. 1032.

102. Negligence—Cause of Injury.—Where the injury may have resulted from one or two causes, for one of which and not the other, defendant is liable, plaintiff must show that the case for which defendant is liable produced the injury; and, if the evidence leaves it uncertain, plaintiff cannot recover.—Graefe v. St. Louis Transit Co., Mo., 123 S. W. 835.

103.—Dangerous Instrumentalities.—One kindling a fire must use care to prevent it from damaging his neighbor in proportion to the risk reasonably to be apprehended.—J. Q. Lloyd Chemical Co. v. G. Mathes & Sons Rag Co., Mo., 123 S. W. 528.

104.—Turntables.—If a railroad company can with slight expense and little inconvenience keep its turntables guarded or locked so as to prevent trespassing children using them, they should be compelled to do so, and if they fall, they are liable for any injury to children of tender years, playing with them.—Brown v. Chesapeake & O. Ry. Co., Ky., 123 S. W. 298.

105. Nuisance—Abatement.—If a building is a public nuisance, the fact that an ordinance declaring it such and ordering its abatement is invalid because not legally passed will not prevent the town from proceeding in equity for its abatement.—Incorporated Town of Lonoke v. Chicago, R. I. & P. R. Co., Ark., 123 S. W. 353.

106. Partnership—Community of Interest.—Before there can be a partnership between the parties they must have joined to carry on a trade or adventure, and there must be community of interest in the property.—Roach v. Rector, Ark., 123 S. W. 399.

107. Principal and Agent—Authority of Agent.—Where an agent undertakes to act for a principal without authority, though in good faith, he is liable to the person with whom he contracts for the damages sustained because of such want of authority.—Roberts v. Tuttle, Utah, 105 Pac. 916.

108.—Liability for Acts of Agent.—A principal's liability for the acts of his agent is not limited to the precise acts authorized, but extends to whatever usually belongs to the doing of such acts or is necessary to their performance.—Roach v. Rector, Ark., 123 S. W. 399.

109.—Set-off or Counter Claim.—The general manager of plaintiff's mercantile business held authorized to agree to set off a claim against defendant for goods sold, against a claim for goods purchased for use in the business, assigned to defendant.—Grubbs v. Nixon, Ark., 123 S. W. 785.

110. Railroads—Bonus Contract.—A bonus contract, providing for payment when an electric railroad was in operation "to the strip of

land above described," did not require that it should be in operation on or over the strip described.—*Boise Valley Const. Co. v. Kroeger*, Idaho, 105 Pac. 1970.

111.—**Injury to Alighting Passenger.**—In an action for injuries to a passenger while alighting from a moving train at his station, evidence held to require the submission to the jury of the issue whether he exercised reasonable care in alighting, though the station was not announced.—*Chesapeake & O. R. Co. v. Robinson*, Ky., 123 S. W. 308.

112.—**Injury to Passenger.**—In an action against a railroad company for personal injuries from jumping off a section of a parted train which was running down grade, evidence held to warrant submission to the jury whether plaintiff left the train on account of the peril he apprehended from a threatened wreck.—*Prescott & N. W. Ry. Co. v. Morris*, Ark., 123 S. W. 392.

113.—**Injury to Person Loading Car.**—The act of an employee of a chair factory in remaining in a car that he was loading until it was hit by a freight engine held not contributory negligence as a matter of law.—*St. Louis, I. M. & S. Ry. Co. v. Clements*, Ark., 123 S. W. 783.

114.—**Killing Animals on Track.**—Dogs are personal property for the negligent killing of which a railroad company is liable.—*St. Louis, I. M. & S. Ry. Co. v. Rhoden*, Ark., 123 S. W. 798.

115.—**Look and Listen.**—While one crossing a railroad track at a public crossing may rely upon the assurance that the way is safe, implied from the crossing gates being open, and cross without looking or listening, he cannot proceed blindly and refuse to see or hear obvious dangers.—*Chicago, R. I. & P. Ry. Co. v. Hamilton*, Ark., 123 S. W. 379.

116.—**Occupation of Streets.**—The public has an equal right with a railroad company to the free use of a highway upon which the railroad track is laid, and the railroad company will not be permitted to omit any reasonable duty that may tend to the safety of the public upon such street.—*Laury v. Northern Pac. Terminal Co.*, Or., 105 Pac. 881.

117. **Religious Societies—Right to Hold Real Estate.**—A foreign corporation held a religious corporation, incapable of holding real estate under a devise for the use and benefit of a training school.—*Proctor v. Board of Trustees of Methodist Episcopal Church*, South, Mo., 123 S. W. 862.

118. **Sequestration—Affidavit for Writ.**—Where the basis for a writ of sequestration was a sworn petition, which contained no allegation of value, as required by the statute, the trial court erred in not quashing the proceedings.—*Cleghorn v. Boxley*, Tex., 123 S. W. 438.

119. **Set-off and Counterclaim—Contingent Claim.**—In an action by a lessee on a note and mortgage given by his assignee of the term, held not error to refuse to allow the assignee damages on a counterclaim for breach of an agreement to secure the lessor's written consent to the assignment of the lease.—*Batley v. Dewalt*, Wash., 105 Pac. 1029.

120. **Specific Performance—Parol Sale of Land.**—A parol sale of land without delivery of possession, though the price is fully paid, is wholly void and gives no right to specific performance.—*Cooley v. Miller & Lux*, Cal., 105 Pac. 981.

121. **States—Action on Bond.**—A provision of a builder's bond requiring payment of laborers' and materialmen's claims must be regarded as a promise without consideration, where no such stipulation was contained in the contract.—*State Board of Agriculture v. Dimick*, Colo., 105 Pac. 1114.

122. **Street Railroads—Care Required.**—A street railway company in the running of its cars is required to exercise ordinary care to avoid injuring a person rightfully using the streets, regardless of any statutory regulation.—*Swanson v. Chicago City Ry. Co.* Ill., 90 N. E. 210.

123.—**Injury to Servant.**—Where plaintiff attempted to board a street car after being warned by the motorman not to do so, and the car could not, with ordinary care be stopped in less than 35 to 45 feet, defendant is not liable

for injuries received by plaintiff while being dragged that distance, but would be liable only for injuries received after the car had traveled that distance.—*Graefe v. St. Louis Transit Co.* Mo., 123 S. W. 835.

124.—**Liability of Lessor of Road.**—The lease of a street railroad, giving the lessee entire control of its operation for a term of years, relieves the lessor from liability for injury resulting from the negligence of the lessee's employees.—*Graefe v. St. Louis Transit Co.* Mo., 123 S. W. 835.

125. **Subrogation—Payment of Debts.**—An administrator who has paid a debt of the estate with assets which he is compelled to refund to the widow, may resort to any remedy that the creditor would have against unadministered assets.—*Flowers v. Reece*, Ark., 123 S. W. 773.

126. **Taxation—Equalization.**—Under Acts 1909, p. 764, secs. 11, 12, the State Tax Commission, acting as a state board of equalization, has no power to equalize individual assessments on the complaint of the taxpayer.—*Bank of Jonesboro v. Tax Commission*, Ark., 123 S. W. 753.

127. **Trusts—Constructive Trusts.**—If defendant and his brother entered and surveyed certain land with the understanding that each would obtain a patent in his own name for his part thereof, and defendant after his brother's death, obtained the patents in his own name, a trust resulted by implication in favor of the priviles of his brother.—*Gibson v. Bartley*, Ky., 123 S. W. 324.

128. **Vendor and Purchaser—Contract to Convey.**—An equitable defense in ejectment, relying on testator's nonperformed contract to convey the land to defendant in consideration of services, was unsustainable in the absence of proof of the contract with certainty, and of a substantial and meritorious performance beyond a reasonable doubt.—*McQuinn v. Moore*, Mo., 123 S. W. 838.

129. **Waters and Water Courses—Collection.**—A railroad company is required, by proper trestles, to permit the natural flow of water, whether surface or not.—*St. Louis, I. M. & S. Ry. Co. v. Magness*, Ark., 123 S. W. 786.

130.—**Irrigation.**—In an action to recover a one-sixth interest in a ditch, in which it is shown that for more than 30 years one-eighth had been used and claimed, evidence held to sustain a finding that plaintiff had only the one-eighth interest.—*Allen v. Swadley*, Colo., 105 Pac. 1100.

131.—**Pollution of Stream.**—A landowner having appropriated the waters of a stream for irrigation held entitled to recover damages from a mill-owner who polluted the stream by poisonous substances from his concentrating mill.—*Humphreys Tunnel & Mining Co. v. Frank*, Colo., 105 Pac. 1093.

132. **Weapons—Unlawfully Carrying.**—In a prosecution for unlawfully carrying a pistol, an instruction held not objectionable as charging that accused must have had reasonable grounds for fearing an unlawful attack at the very time he armed himself, in order to authorize an acquittal, and to be proper.—*Hines v. State*, Tex., 123 S. W. 411.

133. **Wills—Construction.**—The words of the residuary clause of a deed, "the balance of any and all property that may be mine at the time of my death," held ambiguous, so that they could be shown, by deeds executed by testatrix at the same time, and as part of the same transaction, to be intended to cover land which she considered to belong to her as sole heir of an intestate.—*Packard v. De Miranda*, Tex., 123 S. W. 710.

134.—**Estates Devised.**—A devisee in fee of an undivided interest in real estate, which vests immediately at testator's death, subject to termination on the happening of a designated subsequent act or event, is an interest in realty which is transferable by the devisee.—*Newlove v. Mercantile Trust Co. of San Francisco*, Cal., 105 Pac. 971.

135. **Witnesses—Intoxicating Liquors.**—An alleged minor to whom it was claimed defendant illegally sold liquor having denied purchasing such liquor on the date in question, the state was properly permitted to ask him on cross-examination whether he had not been drinking on that evening.—*State v. McCormick*, Wash., 105 Pac. 1087.

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THE RIGHT OF A CORPORATION TO RE-COVER UNFAIR PROFITS FROM PROMOTERS.

The principle that promoters sustain a fiduciary relation to the corporation they promote is generally recognized. And it seems further recognized that, if promoters own all the original shares of a corporation, they are entitled to turn over to the corporation they organize property at an excessive valuation as measured by the par value of shares of stock given in exchange therefor. Indeed, such a transaction is regarded as an agreement between organizers, rather than a scheme by promoters. And where the movers are organizers, it has been held that the fact of a greater profit being obtained by some than by others is not a fraud upon the corporation, but upon the associate organizers. *Blum v. Whitney*, 185 N. Y. 232.

The Supreme Court of the United States and the Supreme Judicial Court of Massachusetts have recently reached conflicting conclusions in a corporation case, where one of the leading spirits in the creation of the same corporation was defendant in the federal court and the other, in the state court, the latter being held liable to the corporation for overvaluation of property transferred to it, and the former not. *Old Dominion C. M. & S. Co. v. Lewisohn*, 210 U. S. 206; *Same v. Bigelow* (Mass.), 89 N. E. 193.

In the federal supreme court the opinion, to which there was no dissent, was by Mr. Justice Holmes, and a majority opinion in the Massachusetts court, from which Justice Holmes came to the federal bench, pointedly rejects his reasoning and conclusion.

These two opinions, in comparison with each other, do not seem to assist greatly

towards the fame of Justice Holmes. He does not appear in his opinion to have considered other authority so thoroughly, or to have stated the relevant facts so clearly, or generally to have argued so discriminatingly, as did Mr. Justice Rugg, speaking for the Massachusetts court.

Of course, some allowance is to be made for the fact that the latter was particularly expected to justify very fully and clearly the majority of a state court in its disagreement with the unanimous view of the highest court in our country. In this situation, the Massachusetts court advanced no opinion, which it did not endeavor to fortify by authority, and where there was a different view about the effect of authority relied on by Justice Holmes, the Massachusetts interpretation was carefully set forth, and extensive reference made to cases.

These considerations naturally produced elaboration in the Massachusetts opinion. The loftiness of its tone seems not, however, to have suffered because of tediousness in recital, and dignified condemnation of fraud runs through all its sentences.

More than this, however, it appears to us that of the two opinions the one by the federal court lacks in definiteness, while the one by the state court gives a clear concept for the formulation of a rule, such as the importance of the question at issue demanded.

The facts in each case showed that Lewisohn and Bigelow arranged to purchase all the shares of an existing corporation and, additionally, some real estate, the purchase price of the former being \$1,000,-000 and of the latter \$5,000. They formed a New Jersey corporation with a capital of \$1,000 and put in dummy directors to manage it. The day after its organization its capital stock was increased to \$3,750,000, divided into 150,000 shares at \$25 per share. The dummy directors resigning and Bigelow and Lewisohn, coming in with three dummies, sold the property they had acquired to the new corporation for 130,-

000 of its shares and left 20,000 shares to be subscribed for to obtain a working capital.

The opinion of Justice Holmes considers that the transaction is to stand upon the theory that this corporation and all its shares, issued and unissued, belonged to these two, and they had the right to apportion them to each other as they saw fit, and it was of no concern to others, if all were taken or some were left unissued, or issued upon a fair equivalent therefor or not.

The position of the Massachusetts court was, that, if shares were left unissued, subsequent subscribers thereof were to be placed on the footing of original subscribers and Bigelow and Lewisohn would be promoters, sustaining a fiduciary relation to the corporation and its shareholders.

The Massachusetts case cites and quotes from decisions in a great number of states, among them cases from Pennsylvania, Wisconsin, Missouri, New Jersey, Kansas and Oregon, in support of its view, that the contemplated sale of shares by the corporation prevents the promoters from being deemed in law the sole owners.

Indeed, this seems the only correct view, as otherwise by the mere official act of the president and secretary selling one share of *treasury stock* to a subsequent subscriber the situation is changed and another original owner brought into the transaction. Certainly, if any injustice is done it is just as baneful to a *subscriber* taking the day after property is turned over at an over-valuation as to one taking the day before. The corporation surely has some legal capacity, and when stock is left in its hands as treasury stock, it can at least hold it as trustee. If one share of it is purchased, it holds the rest for that purchaser and those to whom shares are issued for over-valued property.

More than this. If we may concede it to be non-fraudulent, in the sense that it is not harmful to anyone, for two people to take as many shares of a corporation's stock as they may, between themselves, agree to

take, and for any consideration they choose, when nobody else owns any of its stock, yet, if they are also its directors and authorize sales of remaining shares on the theory that none have been issued for which value has not been paid, *co instanti* any sale, they owe a duty to the corporation, which is the agent of all of its shareholders, to correct an act which, though innocent at the start, has, by the subsequent acts of the same actors, become fraudulent. If one converts an originally innocent transaction into a fraud, he ought to be held liable for fraud just as much as if his act was, from the beginning, intended to accomplish a fraud.

Let us look at this a little further. Suppose the promoters, in these cases, had by collusion and fraudulent representation induced a board of directors honestly to believe their properties were worth 130,000 shares of the corporation's stock, and then they elected themselves its directors, would they not be legally bound to have the corporation correct the fraud, because of the interest of those who had paid full value for their shares? This goes to show, we think, that the corporation could not have imputed to it the knowledge of its directors that a fraud was being perpetrated on it. It was then representing the interests of the present and prospective holders of 150,000 shares and not merely the interests of those holding the issued shares.

It is a rule in law, that the knowledge of an agent, which it is his interest to conceal from his principal, is not imputable to the latter. Just as the poet says flattery cannot "soothe the dull cold ear of death," so an agent of a corporation cannot whisper into its "dull cold ear" that he is defrauding it, while acting for it and outwardly professing to be honest with it. The only way one can tell a corporation anything is to tell its agent, but when an agent tells a corporation, by acting for it, that he is honestly acting, he cannot at the same time contradict himself, and every act following on the last statement is a reaffirmation of the former. The corporation by accepting

his act must be presumed to accept such reaffirmation as true.

There seems here conflicting presumptions. The official acts honestly and the individual dishonestly. It is immaterial who the individual is. If, however, he is another than the official, his internal consciousness cannot manifest itself to the official except by overt acts. If the individual is the same person as the official and puts his individuality on one side of a contract and his trust relation on the other, he, for contractual purposes has made of himself another person, as he himself must contend. Just, therefore, as the official does not know of his private consciousness, equally it may be said he does not know of his private acts, which manifest it, when he deals with himself.

The narrow issue between the federal and the state court is, that the former holds squarely, if it holds squarely on this subject at all, that the owners of thirteen-fifteenths of the shares of a corporation may prior to issuance of any of the remaining shares turn, as consideration therefor, as little or much property into that corporation as they choose, while the state court holds there is a fraud upon the corporation, both because it is a different entity from each and both of the owners of all the issued shares, and because its unissued shares are an asset over and above the issued shares in the very contemplation of those who hold the issued shares, upon each of which they have placed a stated value.

It would seem, that in the very act of taking something for nothing, the promoters to that extent are juggling with words, for by their acts they are presumed to assert that the remaining shares are based on capital to the extent of capitalization.

One cannot believe so, but the solicitude, which seems to afflict Justice Holmes lest injustice should be done to the defendant in the federal case, makes his reasoning look not altogether unlike sympathy for a brilliant thimble-rigger in financial prestidigitation. The Massachusetts judge, on

the contrary, sees a fraud and he is not cognizant of any reason for its being treated less severely, because its consequences, by reason of the greediness of the perpetrators, fall on a less number proportionally than if they had not priced their property so highly and thus left a larger number of unissued shares to be worked off on a confiding public.

It seems to us the rule of *de minimis non curat lex* has little room for application in this kind of case. Fraud is fraud, and whether it leave a large devastation in its trail or not, whenever courts are called upon to strike it, its head appearing, it should be struck. A hard and fast rule is needed for transactions of this kind, and the Massachusetts court appears to offer one, while the federal court does not.

NOTES OF IMPORTANT DECISIONS.

CORPORATIONS—RELIGIOUS CORPORATION DEFINED, WITH REFERENCE TO CONSTITUTION FORBIDDING ITS TAKING TITLE TO REAL ESTATE.—Religion and charity are supposed to be so closely allied, that true religion and true charity go hand in hand, or both are masquerading. This idea makes it somewhat difficult to distinguish one of the twins from the other, who, like the Siamese pair, breathe through the same lungs and are nourished by the same food. Therefore it has seemed to us that the Supreme Court of Missouri has failed to recognize the existence of a cherished similitude between religion and charity in pronouncing a benefaction to a training school for missionary work in propagating the doctrines of the Methodist Episcopal Church, South, to be void as attempting to convey title to a religious corporation, in the sense of those words as used in the Missouri constitution. *Proctor v. Board of M. E. Church*, 123 S. W. 862.

This constitution provides "that no religious corporation can be established in the state, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages and cemeteries."

We venture to assert that unless the words "no religious corporation" are taken in a severely restrictive sense, this provision of the Missouri constitution is easily the most narrow

and intolerant specimen of restrictive legislation in civilized America. The genius of our country abhors it, and it is directly in the teeth of our fundamental theory of worship in freedom according to the dictates of one's own conscience. It is impossible for the Missouri Supreme Court to be correct in holding that a corporation for a training school for missionaries in the propagation of the doctrines of a particular Christian denomination were, by that section, in the minds of the framers of the constitution; for it is impossible to believe that the people of any state of this union would favor any such restraint, when organizations for charity, for benevolence, for literature, learning and art are so liberally encouraged.

There is a purpose easily discerned in the adoption of this provision which can relieve this constitution from such a stigma as three judges of the Missouri court put upon it, their fault being partly condoned by following or approving prior decision in *In re St. Louis Institute of Christian Science*, 27 Mo App. 633.

Construing that section, we would assume, that the framers recognized that various congregations built and owned their churches, parsonages and burial grounds for deceased members, and it might be desirable that title to those things which existed in bodies whose constituents were changing, should be vested in a corporation. Having only this idea in mind, a provision for its better realization was framed. If these congregations were customarily, or even occasionally, having separate Sunday school buildings or libraries, these would likely have been embraced in the clause just as were parsonages and cemeteries. But this being the thought in hand, the class of corporation, denominated religious, must be construed to correspond to that thought and not go beyond it, because a dictionary would support the extension. So restricted, it might well have been thought wise to prescribe, that no church congregation, desiring a corporation to manage its properties, may obtain one except under a general law, the corporation merely holding the title for it. This sort of holding, applying to the same sort of things all over the state, needed something in uniformity if the prior sort of holding was to be displaced. There is no hardship or narrowness in this provision thus construed, but it is in aid of congregational purposes. But to say members of a congregation shall not form a corporation as a training school for its ministers, is not only opposed to this, but it smacks of tyranny of the people over themselves. Such an institution should go into the list of those which are benevolent or charitable.

INDIANS—TRIBAL LAND RESERVED FOR CEMETERY AND JUSTICIALE RIGHTS THEREIN.—The theory of a nation's honor being the ultimate test, as to what has been established between this government and an Indian tribe, received a late application in the case of *Conley v. Garfield*, Sec'y. of the Interior, et al., 30 Sup. Ct. 224.

In 1855 there was a treaty between the United States and the Wyandotte Indians, all tribal relations to be dissolved upon its ratification, this government proceeding on its part to embody the treaty provision in a statute. The Wyandotte Nation ceded all of its land for subdivision in severalty among the members of the tribe, "except the portion now enclosed and used as a public burying ground shall be permanently reserved and appropriated for that purpose."

A descendant of parents buried there sought to enjoin the removal of the remains of those there buried to another place and sell the burying ground, but the Federal Supreme Court denied relief, Justice Holmes thus speaking for the court: "There is no question as to complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quit-claim to the United States. *Lone Wolf v. United States*, 187 U. S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained as the whole of the land had before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law."

Then the judge dilates on the reservation being kept as a promise to a tribe, and not to the individuals of a dissolving tribe, and its honor being pledged to that tribe, and not otherwise.

This reasoning seems to us a very thin veneer of justification for violation of what looks like a vested right. Imagine, if you can, a dissolving corporation excepting from its distributable assets one in which the shareholders are to have rights in common. Each shareholder by such arrangement surrenders a modicum of his dividend to accomplish this purpose. This would look like he had paid value for his individual interest. If he had, would this or not be a vested interest? This is exactly what the Wyandottes did. They reduced their divisible assets, which the United States distributed. It could not take away from allottees

what was distributed, for at least each acquired a vested interest. Did not the United States, by every fair implication of language, agree that this reservation should stand as distributed ipso facto ratification of the treaty? If so, was it not a vested interest in members of the tribe?

The non-justiciable right theory appears to us to be by this decision very unwarrantably extended, and the cloak of honor has been made to cover a taking without due process of law.

LANDLORD AND TENANT—HOLDING BEYOND TERM AS IMPLIED RENEWAL UNDER OPTION.—The Supreme Court of Tennessee draws a distinction in holding over in an option to retain premises at same rental and at an increased rental, where with nothing said on the subject the tenant continues to pay the original rent. *Carhart v. White Mantel & Tile Co.*, 123 S. W. 747.

The court holds, however, that neither in one case or the other is the mere continuance of occupancy by the lessee after expiration of the term more than a mere presumption that he has exercised the option of a renewal. At bottom there is still the question of intention. But the court holds, that to pay increased rental is affirmative evidence of the exercise of the option, and, conversely, paying the original rental is evidence tending to repel the presumption of its exercise, and to make of the lessee a mere tenant at will.

The case cited, *Muriland v. English*, 214 Pa. 325, 64 Atl. 882, annotated fully in 6 Am. & Eng. Ann. Cas. 339, where it was held that where the option was for premises at an increased rental, and the tenant continued in without any new arrangement and paid no increased rental, the tenancy became one from year to year upon the original rental. But this was not accepted by the principal case, but the ruling is that there was merely a tenancy at will—found so to be upon a repelled presumption.

This rule seems to be more according to reason than the Pennsylvania holding, on the theory that the giving of the notice is for the lessor's benefit, he being presumptively unwilling the premises should be held under the old rental and the lessee agreeing, by declining to pay more, that the landlord may retake from him as a tenant at will, the time he continues there being a favor granted by the lessor, and so recognized on both sides. There might, therefore be said to be an aggregation on this subject.

THE HISTORICAL INTERPRETATION OF 'FREEDOM OF SPEECH AND OF THE PRESS.'—PART III.—OTHER FORMS OF IMPAIRING INTELLECTUAL OPPORTUNITY.*

Taxes on Knowledge.—Another form of impairing natural intellectual opportunity and therefore an abridgement of freedom of the press, was by way of taxes upon knowledge. In America, where to a very large extent we have government by newspapers, it seems unlikely that such taxes will ever again become a subject of controversy. However, we must briefly consider the matter as an historical issue, so that our final generalization as to unabridged freedom of the press may negative also this form of abridgement.

George Jacob Holyoke has briefly described the conditions against which he and other friends of intellectual freedom before him, waged such strenuous battle. These are his words: "Yet every newspaper proprietor was formerly treated as a blasphemer and a writer of sedition, and compelled to give substantial securities against the exercise of his infamous tendencies; every paper-maker was regarded as a thief, and the officers of the Excise dogged every step of his business with hampering, exacting and humiliating suspicion. Every reader found with an unstamped paper in his possession was liable to a fine of 20 pounds sterling. When the writer of this published the 'War Chronicles' and 'War Fly Sheets' the Inland Revenue Office bought six copies as soon as each number was out; thus he incurred fines of 120 pounds sterling before breakfast, and when the last warrant was issued against him by the Court of Exchequer he was indebted to the Crown 600,000 pounds sterling. Besides, he had issued an average of 2,000 copies of the *Reasoner* for twelve years, incurring fines of 40,000 pounds sterling a week, which amounted to a considerable sum in twelve years. He who published a paper containing news without a stamp, was also liable to have all

* Parts I. and II. of this article appeared in the two preceding issues of this Journal.

his presses broken up, all his stock confiscated, himself, and all persons in his house imprisoned, as had been done again and again to others within the writer's knowledge. Neither cheap newspapers nor cheap books could exist while these perils were possible."

In his "History of the Taxes of Knowledge," Collet informs us that "The History of the Taxes Upon Knowledge" begins with their imposition (1711) in the reign of Queen Anne. The battle against the press had, indeed, begun before that date." The year 1855 marked the final repeal of the last of these English stamp acts, and those requiring bands, etc., from publishers. Those who are interested in this particular battle for larger freedom of the press are referred to Mr. Collet's interesting account.¹ In all these discussions it is apparent that the main purpose was not to favor one system of raising revenue as against some other system, but to increase the intellectual opportunities of all, by removing *all* state-created impediments to the greatest natural freedom for the interchange of ideas.

The Censorship of Mails.—We next consider the method of creating inequalities in intellectual opportunities, and of abridging them, by means of a state-created postal censorship, which is fast becoming an important issue in the contest for intellectual freedom in America. The American postal censorship over mail matter began in 1873, when a law was passed, without debate, making "obscene" matter unmailable. I am informed that the original draft of this bill included "blasphemy" in the unmailable list, thus again emphasizing the origin in religious intolerance, and pointing to the ultimate purpose of those who are so persistently advocating and securing extension of our postal censorship. This censorship has already been extended, so that now even *political* literature, which in European monarchies, is spread without hindrance, has been excluded from American mails and penalized. The statutes here-

tofore have only provided ex post facto punishment for use of the mails, but did not authorize the postal authorities to prevent the transmission of prohibited matter. In several congresses the Postal Department asked an amendment to the laws, such as would give the postmaster power to refuse transmission to forbidden matter. The amendment never was passed. Not abashed by the refusal of Congress to confer the power, the authorities proceeded to usurp it under the usual guise of a new "construction" of existing statutes. This usurped power, having been calmly acquiesced in by the public, soon received judicial confirmation, and gradually has been extended, so that now it assumes to over-ride the judicial department by excluding from the mails publications which the courts have decided are mailable, and has excluded matter without the warrant of any statute, relying upon the absence of a remedy for the afflicted persons.

Under our modern conditions of living, with its cheap printing and postal facilities, to be denied the use of the mails for the spread of one's ideas, creates a relatively greater inequality and abridgement of intellectual opportunity than ever was created by any prior form of censorship. Since private competitors of our public mail service are prohibited by law, and since in these times of a cheap periodical press, no one can hope ever to attain a favorable public opinion in competition with his intellectual opponents, except by publication through the mails, therefore it follows that a postal censorship is the most effective possible abridgement of freedom of the press. However, since the postal authorities now exercise a usurped censorship over postal matter prior to publication through the mails, we have quite effectively, though unconsciously, re-established in some fields of thought a "*previous censorship*," substantially like that against which Milton wrote nearly 300 years ago. If this previous censorship is upheld, in spite of our constitutions and judicial dictums against the legal possibility of a "*previous censorship*," then its spread into other, and finally

(1) *Taxes on Knowledge the Story of Their Origin and Repeal.* Lond. 1899; see also Patterson on *Liberty of Press and Speech*, p. 57.

all, fields of thought is only a matter of time. Under present conditions the difference between a censorship previous to printing and one after printing, but previous to import, because a book that cannot get publicity by mail might as well never be printed, since without facilities for distribution by post, interstate commerce, or private competitors of the postal system, the securing of readers is practically impossible. Furthermore, a censorship after printing, and before publication by mail, is worse than one before printing, because it inflicts the needless loss of the cost of printing.

The infamous Licensing Act of England, against which Milton wrote, was passed September 20th, 1649, provided, among its pernicious abridgements of freedom of the press, that no person whatever shall presume to send by the post, carriers or otherwise, or endeavor to dispense any unlicensed book, etc., on penalty of forfeiture, fine and imprisonment. As if to add insult to injury, every printer was required to give a bond to "*The Keepers of the Liberties of England*," to insure against the violation of the licensing act. It was precisely this censorship previous to publication by mail, against which Milton wrote his *Aeropagitica*. Our courts have said that the absence of "such previous restraint as had been practiced" is the one thing at least against which our constitutional guarantees protect us, and yet in spite of courts and constitutions, we have for some time acquiesced in just such a usurped postal censorship previous to publication by mail. Furthermore, owing to the uncertainty of the statutory criteria of mailability, this censorship previous to publication by post is in practice an arbitrary discretion. So then, we do not even have left the one lonely element of freedom, which our courts too often have mistaken for all there is to *unabridged* freedom of the press. Even that little "all" has disappeared, and only the blank paper of our constitutional guarantee remains. When the issue is squarely presented will our courts confirm also the destruction of this last element of freedom of the press, and so vest congress and our

federal bureaucracy with *all* the powers over the press which our constitution was supposed to withhold?

An English barrister-at-law gives us this brief account of the postal censorship in England: "The right of free speech and writing can scarcely exist in perfection without mechanical facilities for exchanging letters and printed matter between correspondents; * * * What is desired by each and every citizen is, that he shall be entitled to send and receive all communications which he thinks material to his own interest, and that no third party shall be allowed to tamper or interfere with this operation—so that a message sent in writing or print shall be secret and inviolable from the moment it is despatched till the moment it is delivered. This has for two centuries been more or less attained. The great medium for this communication between the subjects began in 1635, on a small scale, at the suggestion of the Crown, but Parliament soon saw its importance, and in 1649 passed a resolution that the office of postmaster ought to be the sole disposal of Parliament. In 1710 a statute laid down the chief rules, and one of these continuing as it did the first sketch of a plan projected under Charles I, forbade all other persons to carry and deliver letters for hire. * * * * *

"It appears to have been a century ago the common complaint of leading statesmen, that their political opponents made a practice of opening their letters when they had the power. * * *

"In 1822 complaint was made by a member of Parliament, that a letter sent him by a prisoner had been opened. And though the government claimed the right to do so for precaution, yet many urged that it should be deemed a breach of privilege; this step, however, was not taken.² Again, in 1884, instances of private letters being opened were complained of, and parliamentary committees investigated the practice and found sufficient confirmation of the suspicion that such a practice was not

unfrequent, especially in connection with foreign refugees.³ Sir R. Peel said that no rule could be laid down on such a subject and successive Secretaries of State of all parties had been in the habit of exercising this power at discretion.⁴

Thus this great authority on freedom of the press informs us that according to the English conception of it, the period of our revolution found it a matter of constant complaint that there was a post-office censorship. Those who thus complained were the friends of a larger intellectual liberty and it was their view that was adopted into our constitutional guaranty for the security of papers against unreasonable searches, and against all abridgements of freedom of utterance. These two clauses together, until judicially explained away, would seem clearly to preclude the search of unsealed as well as sealed mail-matter, *for the purpose of creating inequalities or right to the public service*, according to whether the ideas transmitted are officially approved or disapproved. This is the self-evident meaning of our constitution when viewed in the light of the issues that were agitating the public at the time of its adoption. The manifest purpose was the increase of intellectual opportunity, even though it protected such as might be inclined to sedition, and just as manifestly it was not the purpose merely to change a business policy in relation to a department of government.

To show that the advocates of unabridged freedom of the press included a mail service free from censorship, as a part of their conception of freedom of the speech, I will content myself with one quotation from Jeremy Bentham, as confirming the foregoing historical interpretation. After explaining that the only check to tyrannous government is "instruction, excitation and the faculty of correspondence" that "the national mind be kept in a state of appropriate preparation; a state of preparation for eventual resistance," the latter continues

thus: "Necessary to instruction—to excitation—in a word to a state of preparation directed to this purpose is (who does not see it?) the perfectly unrestrained communication of ideas on every subject within the field of government; (which includes the discussion of sexual physiology and psychology as a foundation for sex ethics, and the latter even from the view-point of the free-lover and polygamist because a democratic government must leave itself free to change even its marriage laws.) The communication, by vehicles of all sorts—by signs of all sorts, signs to the ear—signs of the eye—by spoken language—by written, including printed language—by liberty of the tongue, by liberty of the writing desk, *by liberty of the post office*—by the liberty of the press." He repeats that is necessary "not only for instruction, but for excitation" all "to keep on foot every facility for eventual resistance."⁵

Bentham then pointed to the United States as a place where such liberties existed, but he could not do so now were he alive. The Declaration of Independence, the constitutional guarantees for the right of assembly, due process of law, and the right to bear arms, and against searches and seizures, the declarations of the conventions of several of the states, the constitutional guarantees of unabridged freedom of speech and of the press, all proclaim the intention to protect the right of the citizen against punishment for mere psychologic crimes to the end that he may be always prepared for eventual resistance, even of government itself.⁶

Psychological Tendency of Criterion of Guilt.—Historically considered an inseparable part of the contention for a larger, or an unabridged, liberty of speech and of the press, was the condemnation of that practice in the prosecution for libels which made the guilt of the accused depend upon "the

(3) 75 Parl. Deb. (3) 1264; 76 Ibid. 212, 296.

(4) Rep. of Secret. Com. 1845; Patterson, *Liberty of the Press, Speech and Public Worship*, pp. 58-59.

(5) Jeremy Bentham on *Liberty of the Press and Public Discussion*.

(6) Stevens, *Sources of the Constitution of the United States*, pp. 223-224; Blackstone's *Commentaries*, Vol. I., p. 154; Cooley, *Constitutional Law*, 270.

evils which may be imaginatively and prospectively attributed to the influence of his opinions." The opposition to this uncertainty in the criteria of guilt was not limited to persons who believed in unabridged freedom of speech, but was often very forcibly urged by those who desired only a little or no enlargement of intellectual opportunity. Even Blackstone believed that the criteria of guilt for heresy and seditious utterances should be made more certain.

The protest against the uncertainty of the tests of criminality in prosecutions for seditions and blasphemous utterances was upon two distinct grounds. The first and most general of these was based upon the historical retrospect, and was an appeal to expediency. The argument ran thus: Books once condemned for their supposed evil tendencies are now believed to have been good and useful. In making this psychologic tendency of an utterance the test of its criminality, we are again opening the door for a repetition of such error. Therefore, such criminal laws are inexpedient and should be abolished. The second reason for objecting to the tendency-test in penalized utterances was from the point of view of that larger demand for liberty which was founded upon the idea that no freeman should be deprived of his liberty except by *lawful* judgment of his peers or by the *law* of the land. This was predicated upon the conception that every man should in justice be forewarned that his act is penalized. It could not be the law of the land if it did not impart that advance information, and could not accomplish this except an exact statement of the criteria of guilt was part of every criminal statute. By such means the lovers of liberty hoped to attain *freedom under law* in contra-distinction to a mere liberty by permission under lawless despotism. To such persons it was self-evident that a speculative opinion about the psychologic tendency of an utterance upon a future undescribed, hypothetical reader, or hearer, when used as a criterion of guilt, could be no restraint upon the moral idiosyncrasies, stupid bigotry, unreasoned hysterical apprehension, personal

interest, or even the superstitious malice of those charged with the duty of determining whether or not a verbal crime had been committed. It was seen that under such circumstances guilt must be determined by *ex post facto* standards, personal to the individuals passing judgment. This it was argued was government according to the lawless despotism of man and the friends of freedom demanded as one of the conditions without which there could be no liberty of speech or press, or liberty of any sort, that the criteria of guilt be so certain that every man may know in advance from the very letter of the law, by what standard his conduct would be adjudged criminal. It goes without saying that so long as an *ex post facto* judicial guess as to the psychologic tendency of a speech, book or picture is the test of guilt, there can be no such thing as *liberty under the law*. Even to those to whom "free speech" meant a limited liberty by permission, the demand for freedom, only in relation to speech, still was a protest against tyranny by demanding for every man's opinion freedom from that arbitrary power for the penalizing of words by standards of an *ex post facto* guess, or pretense, about "the evils which may be imaginatively and prospectively attributed to the influence of his opinions."

As proof of the assertion that a demand for certainty in the criteria of guilt always was a part of the agitation for more freedom of speech and press, we need but to point to that vast literature which was brought into being against constructive treason and seditious libel. Here it is only necessary to call attention to its existence as a part of the agitation for enlarged liberty. The discussion of the question is better treated as a subdivision of an argument to support the contention that "Due Process of Law" does not obtain unless every criminal statute shall prescribe the criteria of guilt with mathematical certainty.

In Conclusion.—This historical review of the contentions which resulted in the adoption of our constitutional guarantees for an *unabridged* freedom of speech and of the press, is already too long for com-

fortable reading, and not long enough to be anything like an exhaustive treatise. I believe, however, that it adequately establishes the following proposition:

I. The contention for an *unabridged* freedom of utterance was always founded upon a demand for unrestrained intellectual opportunity, and never concerned itself primarily with preferences between different methods of abridging that freedom.

II. It opposed all past and existing restrictions upon intellectual intercourse, such as licensing printers, or books, censoring the post or other means of transmission, taxes upon knowledge, and *ex post facto* punishments; and our constitutions not only sought to preclude a recurrence of any of these former methods of abridging intellectual opportunity, but the language used clearly expresses the determination to preclude the enforcement of any other, therefore untried, method of curtailing intellectual intercourse.

III. The demand for unabridged freedom of utterance, always was a demand for the abolition of all mere psychologic crimes, and that uncertainty which attended them, from the fact that the criteria of guilt was usually "the evils which may be imagined and prospectively attributed to the influence of one's opinions," and the co-related demand that crime should always be predicated upon a certainty, such as an actual and material injury, or perhaps also the imminent danger of such, according to the known laws of the physical universe.

If we generalize all these contentions for a larger and an unabridged intellectual opportunity, we shall have a comprehensive statement of the historical interpretation of unabridged freedom of speech and of the press, and if the form of statement is such as to furnish us with the criteria for determining a breaching of the constitutional guarantee we shall have a statement in substance like that at the beginning of this essay.

THEODORE SCHROEDER.

New York City.

BAILMENT—IMPUTABLE NEGLIGENCE.

GIBBONS v. BESSEMER & L. E. R. CO.

Supreme Court of Pennsylvania, Jan. 3, 1910.

Where the owner of a livery stable lets out a horse and buggy, and the horse is killed at a grade crossing by the joint negligence of the bailee and the railroad company, the negligence of the bailee is not to be imputed to the owner of the horse, so as to prevent him from recovering from the railroad company.

POTTER, J.: This was an action of trespass brought in the court of common pleas of Butler county by Martin L. Gibson against the Bessemer & Lake Erie Railroad Company, to recover damages for the killing of plaintiff's horse and for injuries to his buggy and harness, alleged to have been caused by the negligence of defendant's servants. Upon appeal to the superior court the judgment was affirmed, and from this judgment of the superior court the present appeal was taken.

It appears that the plaintiff was the owner of a livery stable in the borough of Butler. On June 25, 1906, he let for hire a horse and buggy to one Lantz, who, with a companion named Nicholas, drove through the town. In crossing the tracks of the defendant company where they intersect at grade with Main street, a public street of the borough, the horse and buggy were struck by a tender attached to one of the defendant's engines which was running backward at the time. The horse was killed, and the buggy and harness badly damaged. Both Lantz and Nicholas admitted on cross-examination that they did not stop before driving upon the railroad track. They both testified that they were struck by the tender of an engine, running backward at a speed of 15 or 20 miles an hour, that there was no bell rung nor whistle sounded, nor warning of any kind given them of the approach of the engine, and that there was no flagman or electric bell at the crossing. Another witness, George Howard, who was on the opposite side of the crossing and saw the locomotive approaching, testified that he did not hear any whistle blown or bell rung, and saw no flagman. Both the trial court and the superior court held that the driver of the buggy was by his own admission guilty of contributory negligence, but that such negligence was not imputable to the plaintiff, and did not affect his right to recover for injuries to his property caused by defendant's negligence.

As to the main question raised—the relation between a livery stable keeper and one who hires from him a horse and carriage—we have no doubt but that it is that of bailor and bailee, and that the contract between them for the hire and use of the chattels constitutes a bailment. In 1 Bouvier's Law Dict. (Rawle's Ed. 1897) 213, bailment is defined as "a delivery of something of a personal nature by one party to another, to be held according to the purpose or object of the delivery, and to be returned or delivered over when that purpose is accomplished." In Schouler on Bailments (3d Ed. 1897) Sec. 130, it is said: "In the bailment for hired use the bailor, technically styled the 'letter,' shifts over into the party entitled to recompense, while the hirer, in turn becomes bailee. This bailment * * * contemplates the temporary beneficial use of a chattel which the bailee must eventually return. * * * Our reports furnish few cases of consequence under this head, save in the instance of hiring a horse or carriage." In section 137 the author, still discussing bailments for hire, further says: "Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use." In the text-books treating of the law of bailments, constant reference is made to contracts for the hiring of horses and vehicles, as illustrating the contract of bailment. See, for example, Edwards on Bailments (3d Ed. 1893) Sec. 373, and Van Zile on Bailments (2d Ed. 1908) Sec. 119.

The weight of authority also seems to sustain the proposition that the negligence of a bailee for hire is not to be imputed to the bailor. In the work just quoted (Van Zile), one of the latest on the subject, in section 128, it is said: "The bailee does not stand in the place of the bailor; he does not represent him in such a relation as would render the bailor liable for his negligent acts, or for the negligent acts of his servants or agents, and so, while in an action brought by the bailee against third parties for injuries to the property, the third party may defend in the action upon the ground of contributory negligence upon the part of the bailee, his servants, or agents, in an action by the bailor, who is the owner of the property, against a third party for injury to the bailment, the negligence of the bailee, or his servants or agents, would be no defense, and would not prevent a recovery for the reason that such negligence is not imputable to the bailor."

And in Edwards on Bailments (3d Ed. 1893) Sec. 392, it is said: "The hirer of wagons, or carriages and horses, receiving them into his custody to be used by him at his pleasure,

becomes a bailee, and is in no sense a servant of the owner. He is responsible to the owner for the reasonable care of them, and to third persons for any negligence of his servants in the use of them. He is liable to third persons to the same extent as if he were the actual owner of the vehicles and teams used by him." And again, in 1 Thompson on Negligence (1901) Sec. 512, it is said: "Unless the principles upon which the courts have at last settled have been grossly misconceived, the negligence of a bailee or his servants is not imputable to his bailor." As far back as the case of *Bard v. Yohn*, 26 Pa. 482, Justice Knox stated the law as follows (page 489): "If one lets or hires to another a horse to be used exclusively for the purposes of the latter, the owner of the horse is in no wise responsible for the negligent manner in which the horse may be used."

There is a difference where the owner sends a driver to manage and control the team and vehicle, for in so doing the owner retains the control, and may well be held accountable for the action of the driver, his servant and agent. But in the present case no driver was furnished, and the hirer assumed the care and control of the horse. There was no relation of master and servant, or of principal and agent, between the hirer and the liveryman, and the latter cannot be held responsible for the negligence of the former. Each must recover in his own right, if at all, and each must stand upon his own ground. Had Lantz, the hirer, brought suit and shown negligence by the defendant, and no negligence upon his own part, he could have recovered for damage to himself, but not for damage to the horse or vehicle. His right of action depended in no way upon that of the present plaintiff, nor does the right of recovery in the present action depend upon the right of the bailee to recover.

Counsel for appellant further contend that the plaintiff did not present sufficient evidence of negligence to justify the submission of the case to the jury. The record shows that plaintiff relied upon three witnesses to establish negligence. One testified, in substance, that the horse was struck by the tender of an engine backing up towards the yard. The engineer gave no signal, did not ring the bell, and did not blow a whistle. There was no watchman at the crossing, nor any electric bell. There is considerable travel at the crossing. It is one of the busiest streets in town. The engine was traveling, in witness' judgment, 15 or 20 miles an hour. It was going so fast that it ran 300 or 400 feet after they hit the rig before they could get it stopped. Another witness said that he was in the buggy with Lantz; that there was no warning given of the approach of the engine to the crossing,

either by blowing the whistle or ringing the bell, and that there was no flagman nor electric bell at the crossing. The crossing was on the extension of Main street in the borough of Butler, at a point where there is a great deal of travel. The engine was traveling fast, and it went on after it struck the horse 300 or 400 feet before it came to a stop. Another witness testified that he was on the opposite side of the crossing, watching the locomotive as it approached, and heard no whistle or bell. It thus appears that the evidence for the plaintiff was not merely negative. It was positive, and was given by witnesses who alleged that they were in a position to hear and were listening and would have heard, had the signals been given. This, in connection with the testimony as to the speed of the locomotive, was sufficient to take the case to the jury, on the question of defendant's negligence. The credibility of the witnesses was for the jury.

The assignments of error are all dismissed, and the judgment of the superior court is affirmed.

Note.—The Doctrine of Non-imputable Negligence of Drivers of Vehicles the same in Negligence by Third Persons as in Actions Against Masters.—The principal case was affirmed in the Pennsylvania Superior Court (see 37 Pa. Supr. Ct. 70), three of the seven judges dissenting, but dissentents filed no opinion. The opinion of the majority says: "If Lantz, the bailee of the horse and buggy, were the plaintiff here, it is clear there could be no recovery, because of his admitted contributory negligence in disregarding the well-known rule of 'stop, look and listen.' The court left it for the jury to say whether or not the defendant was negligent." The defendant on its motion for judgment *non obstante veredicto* submitted the proposition that "It was the imperative duty of E. E. Lantz, the occupant and driver of the buggy, to have stopped, looked and listened at the point at which he could see and hear before crossing the track." And the trial court answered: "Affirmed as a rule of law, but not applicable in this case, for the reason that Lantz is not the plaintiff, unless his failure to do so was the sole cause of the accident." This opinion dwells somewhat on the sole cause of accident theory, affirming the trial court's declaration and there is found this declaration: "If the defendant and Lantz were both negligent—and that the defendant was so negligent has been found by the jury—which of them would be responsible for the injury? They were joint tort feasors; their concurrent negligence caused the accident."

The case of Linte, Receiver v. Hackett, 116 U. S. 366, shows a suit by the occupant of a public hack, who merely gave directions as to the place he was to be conveyed, receiving injury from collision of a train with the hack, the suit being against a railroad. Mr. Justice Field, after first expressing his disagreement with the case of Thorogood v. Bryan, 8 C. B. 114, to the effect that such a driver is not the passenger's servant,

nor his negligence imputable to him (all of which character of questions we considered in 69 Cent. L. J. 228), then considers the question whether or not such driver's contributory negligence barred recovery against the railroad. A large number of state cases are considered in this opinion.

The learned Justice states the matter thus: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it.

If his fault whether of omission or commission has been the proximate cause of the injury, he is without remedy against one also in the wrong. It would seem that the converse of this doctrine should also be accepted as sound—that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrongdoer. And such is the generally received doctrine unless a contributory cause of the injury has been the negligence or fault of some person to whom he sustains the relation of superior or master in which case the negligence is imputed to him, though he may not personally have participated in it."

In Bennett v. N. J. R. Co., 36 N. J. L. 225, it was held that the driver of a horsecar being negligent in crossing a railroad track did not bar right to recover from the railroad for its negligence in striking the car and injuring a passenger therein. It was held that the negligence of the driver co-operating with that of persons in charge of the train, which caused the accident, was not imputable to plaintiff, as contributory negligence, to bar his action.

In Dyer v. Erie R. Co., 71 N. Y. 228, the plaintiff in a suit against a railroad, was riding in a wagon by permission of, and invitation of the owner of the horses and wagon, and no question of contributory negligence by such driver was allowed to be considered. Transfer Co. v. Kelly, 36 Ohio St. 86 was a case like the Bennett case, *supra*, the evidence showing a collision between the wagon of a transfer company and a car of a street car company. It was said the evidence showed both companies were negligent. The injury was to a passenger on the car. It was said "the negligence of the (car) company could not be imputed to the passenger, where its negligence contributes to his injury jointly with the negligence of a third party." The court deemed an opposing contention "absurd." See also R. Co. v. Shacklet, 105 Ill. 364; Cuddy v. Horn, 46 Mich. 596.

Where contributory negligence was claimed upon the part of a bailee of a wagon and horse in his being on a street railway track (the wagon and horse being struck by a street car), it was said, if he was chargeable with negligence, this was not imputable to plaintiff and the sole question that should have been submitted to the jury was whether there was negligence in his being run upon. Currie v. Consolidated Ry. Co., 81 Conn. 383, 71 Atl. 356. The opinion in this case argues that the wagon had a right to be upon the

track and it was the duty of defendant to keep its cars under control and also to provide lights sufficient to show the track ahead of it, and the reasonable conclusion is that, if this is done and all reasonable precautions adopted not to run upon one on the track, there would be no negligence, putting the matter as regards defendant's negligence on the same plane as if the bailee had been suing for a personal injury to himself. But if bailor were suing the bailee's negligence in exposing the wagon and horse to danger of destruction, could not be inquired into.

This theory of negligence in such cases as we have instanced not being imputable to a passenger seems, at bottom, opposed to that which we considered in our annotation above referred to. There non-imputability went upon the idea that passengers in vehicles trusted themselves absolutely to the servant of the proprietor of the vehicle. The principle of *respondeat superior* was squarely involved. But here it is said that, when you so trust yourself and in consequence of your yielding voluntarily to that trust you are carried into danger, you are just as much a third person to all of those whose concurring negligences injure you, as if you had never so trusted yourself. Are you such a stranger? Does it not seem rather, that so far as the proprietor of the vehicle is concerned, the driver is his servant, and so far as others are concerned, who injure you when you have placed yourself in his care, he is your servant. You rely on the driver not to carry you into danger and can hold his superior responsible, if he does, but just because you have an action against him, there seems to exist a position entitling you to rights which prevents you from being a stranger to the situation. If your own driver carries you into danger, his contributory negligence binds you. Is he not your driver in the sense that you trust yourself to him? We have not seen any discussion in the cases on this theory.

C.

JETSAM AND FLOTSAM.

WESTERN FEDERAL JUDGES UNDER FIRE.

Prominent federal judges in the Central West are under fire. The Western newspaper press, we understand, are beginning to reprint the charges of a certain socialist paper published at Girard, Kan. These charges are so serious in some cases that they have aroused some of our leading Western attorneys, who, in writing to us, demand that there be some official investigation, not only in the interest of the judges themselves, but to restore the people's confidence in the judiciary of our federal circuit and district courts.

Our own attitude toward these charges has been and is yet one of indifference, since the source of them has not been altogether creditable. But the repetition of these charges in other more respectable publications and the nervousness and restlessness of the western bar in the face of this bitter attack upon the federal judiciary before whom they must practice, have made it incumbent upon us to demand in the interest of the profession that these charges be disproved, as we believe they can be, and the federal judiciary vindicated.

In most cases of assaults of this character upon the judiciary it is usually the most dignified thing to ignore them. But where such charges take the form of a recitation of particular instances and evidence is offered to prove them, and they thus become definite enough to challenge the attention of more respectable newspapers and even of members of the bar, it becomes the duty of the judges thus attacked, or of Congress to demand an investigation and refute the imputations thus made.

On the other hand we urge upon members of the bar to uphold everywhere the members of the federal bench who may be thus attacked and to demand that their detractors shall carry their evidence to Congress, the proper authority to deal with such charges, and that they shall not peddle them around the country without any further substantiation than has already been offered.

Every lawyer is jealous of the integrity of the judiciary before whom he practices. A false charge makes him indignant, and a charge proven to be true, humiliates him. Yet he insists that that members of his profession who thus disgrace the judicial ermine and thus bring unmerited humiliation upon the profession, shall be promptly disrobed.

The lawyer, however, is by training, slow to accept charges directed against the judiciary. He appreciates that their source is often traceable to the chagrin and bitter resentment of some defeated litigant. He, therefore, is inclined to reserve judgment and resent the imputations. This is still, we believe, the attitude of the Western bar toward the judges who have been thus attacked. Nor do we believe that their confidence has been misplaced. We think, however, it would be better to have the charges thoroughly refuted and the calumniators publicly rebuked.

HUMOR OF THE LAW.

A Southern banker recently told the following about his 8-year-old son: The boy had been invited to spend a week with some little friends in the country. "Stay and keep me company, Jack," said his mother. "Father goes traveling this week, and I shall be all alone. Here is a five-dollar bill for you instead of the visit."

Jack promptly closed with the offer, and the banker as promptly borrowed the \$5 at current interest, thereby keeping, as he observed when telling the story, both the boy and the money in the family. Some two months later Jack wanted to recall the loan.

"What \$5 do you mean?" asked the banker.
"Why, the \$5 I gave you."

"I haven't any \$5."

"But I gave it to you. Mother didn't I give him \$5? You saw me."

"I certainly did," she replied.

"Where's your receipt, then?" demanded his father. "Do you mean to say you've been lending money without getting black and white to show for it?"

"Mammie," said the boy, appealing to his nurse, "didn't I give papa \$5?"

"Yoh poh' little lamb!" indignantly exclaimed the old woman. "Co'se you done gib it to him, honey."

"There, papa," said the budding lawyer, triumphantly, "there's the black and white of it." —The Delineator.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. Action—Rights and Remedies.—Where a statute or the constitution creates a right, but is silent as to the remedy, the party entitled to the right may resort to any common-law action which will afford him adequate redress.—*State ex rel. Applegate v. Taylor*, Mo., 123 S. W. 892.

2. Adulteration—Coloring Kerosene Oil.—Illuminating oil colored red is not an adulteration as a matter of law.—*Bartles Oil Co. v. Lynch*, Minn., 124 N. W. 1.

3. Adverse Possession—Claim of Ownership.—A person fencing in land as a part of his own which had been exchanged for other land but had not been deeded to him held to hold it by adverse possession.—*Quigg v. Zeugin*, Conn., 74 Atl. 753.

4. Aliens—Exclusion of Chinese.—A Chinese person, denied admission to the United States after a full and fair hearing, who accepts such decision and deportation without appealing, is concluded thereby, and cannot, by applying for entry at a different port, have a rehearing on the same question.—*Ex parte Lung Foot*, U. S. D. C., N. D. N. Y., 174 Fed. 70.

5. Alteration of Instruments—Materiality.—Cross-marking of material provision in written instrument, without consent of one of the parties, held a material alteration.—*O. N. Bull Remedy Co. v. Boyer*, Minn., 124 N. W. 120.

6. Appeal and Error—Appeal Bonds.—Allowance of an item of interest for money borrowed, in an action on a bond, given to stay proceedings pending appeal, held erroneous.—*Kansas Bitulithic Paving Co. v. United States Fidelity & Guaranty Co.*, Kan., 106 Pac. 45.

7. Review.—A verdict for damages will not be disturbed as excessive on appeal, unless it is so plainly and outrageously excessive as to suggest, at the first blush, passion, prejudice, or corruption of the jury.—*Hale v. San Bernardino Valley Traction Co.*, Cal., 106 Pac. 83.

8. Assignments—Expectancies.—A sale of an heir's expectancy, if fairly made for a valuable consideration, will be enforced when the property comes into possession, as an agreement to convey.—*Taylor v. Swafford*, Tenn., 123 S. W. 850.

9. Rights of Assignee.—The assignee of a right of action for breach of covenants of title could only recover the damages suffered by his assignor.—*Simons v. Diamond Match Co.*, Mich., 123 N. W. 1132.

10. Attachment—Property of Non-Resident.—A claim by an attaching creditor may be established against a non-resident only constructively served with summons, to an extent sufficient to enable plaintiff to devote defendant's property, attached in this state, to the payment of his claim.—*Wait v. Kern River Mining, Milling & Developing Co.*, Cal., 106 Pac. 98.

11. Attorney and Client—Improper Statements in Brief.—Contemptuous, insolent, and insulting language used by an attorney in a brief on rehearing held ground for his suspension from practice.—*In re Dunn*, Neb., 124 N. W. 120.

12. Bankruptcy—Duties of Receiver.—A receiver for a corporation, adjudged bankrupt after an interlocutory decree against it for infringement of a patent, cannot be required by the Circuit Court to render any active assistance to complainant on the accounting at the expense of the bankrupt estate, unless he elects to become a party to the suit.—*American Graphophone Co. v. Leeds & Catlin Co.*, U. S. C. C. S. D. N. Y., 174 Fed. 158.

13. Election of Trustee.—An officer or director of a bankrupt corporation, although a creditor has no right to vote at the election of a trustee, nor to control the votes of other creditors, and such votes should be excluded.—*In re L. W. Day & Co.*, U. S. D. C., S. D. N. Y., 174 Fed. 164.

14. Examination of Bankrupt.—Where a bankrupt, on his examination before a referee, persistently makes false or evasive answers, although it is evident that he must be able to reply fully and correctly, the court is justified in punishing him for contempt.—*In re Singer*, U. S. D. C., E. D. Pa., 174 Fed. 208.

15. Foreign Corporations.—A mere traveling salesman for a corporation, sent into another state on a special matter with specific instructions, but having general authority to solicit orders for goods, to be submitted to the company for approval, is not an agent of the foreign corporation on whom service of process against it may be made.—*William Grace Co. v. Henry Martin Brick Mach. Mfg. Co.*, U. S. C. C. of App., Seventh Circuit, 174 Fed. 131.

16. Involuntary Proceedings.—There is no liability on the bond of petitioners in involuntary bankruptcy proceedings, except for the usual costs, unless they acted without probable cause and maliciously, and in that case the remedy is a suit in the nature of a suit for malicious prosecution.—*In re Moehs & Rechnitzer*, U. S. D. C., S. D. N. Y., 174 Fed. 165.

17. Power of Court.—A court of bankruptcy is without authority to enjoin a suit in a state court to recover property from one claiming to have purchased the same from a bankrupt's trustee, where such property was not claimed nor scheduled by the bankrupt, nor in fact sold by the trustee, and the bankruptcy court, therefore, never had any jurisdiction over it, or to determine its ownership.—*In re Blue-stone Bros.*, U. S. D. C., N. D. W. Va., 174 Fed. 53.

18. Removal of Trustee.—Where a trustee in bankruptcy absconded, and was removed, the appointment of a new trustee by the court, without calling a meeting of the creditors for an election, was at most an irregularity, and the legality of the appointment cannot be questioned collaterally by persons who are not creditors.—*Scofield v. United States*, U. S. C. C. of App., Sixth Circuit, 174 Fed. 1.

19. Reopening of Estate.—Where a bankrupt estate, which has been closed without any claims having been filed, because no assets were scheduled, is reopened on the finding of unknown assets after the year for filing claims, the court may permit the filing of claims within a year from the date of the order.—*In re Piereson*, U. S. D. C., S. D. N. Y., 174 Fed. 160.

20. Setting Aside Order.—A motion to vacate an order made by a referee in bankruptcy, on the ground that he was without jurisdiction to make it, should be entertained at any time and disposed of on the merits; the doctrine of laches having no application in such case.—*In re Willis W. Russell Card Co.*, U. S. D. C., N. J., 174 Fed. 202.

21. Bills and Notes—Consideration.—A guarantor held entitled to the cancellation of a note

given by him to the creditor in settlement of his supposed liability, but which was in excess of his actual liability.—National Bank of Commerce of Kansas City, Mo., v. Rockefeller, U. S. C. C. of App., Eighth Circuit, 174 Fed. 22.

22. **Boundaries**—**Presumptions**.—The presumption that the mention of a way as a boundary of land conveyed passes title to the middle of the way, if the title is in the grantor, is not an absolute rule of law, but merely a rebuttable presumption.—Frost v. Jacobs, Mass., 90 N. E. 357.

23. **Brokers**—**Contracts**.—A broker authorized to sell real estate for a specified sum for a commission in excess of that sum has authority to make a cash sale only.—Slayback v. Wetzel, Mo., 123 S. W. 982.

24.—**Sale of Real Estate**.—Owner of land cannot complete purchase with one agent and avoid his liability to the broker who first introduced the purchaser.—Beougher v. Clark, Kan., 106 Pac. 39.

25. **Building and Loan Associations**—**Withdrawal of Stock**.—A member of a building and savings association cannot claim that a waiver of forfeiture by acceptance of overdue payments of dues, was an excuse for the nonpayment which precluded the withdrawal of stock, where the association does not claim a forfeiture.—Hoyt v. Harbor & S. Building & Savings Ass'n, N. Y., 74 Atl. 349.

26. **Burglary**—**Possession of Stolen Property**. Where larceny is committed at the time of a burglary, the recent possession of the stolen property is evidence of the burglary, warranting a conviction if unexplained.—People v. Everett, Ill., 90 N. E. 226.

27. **Cancellation of Instruments**—**Married Woman's Deed**.—A married woman's deed to secure the separate debts of her husband being void ab initio, she was not bound to reimburse the beneficiary for moneys then advanced to the husband.—Taylor v. Swafford, Tenn., 123 S. W. 350.

28. **Carriers**—**Delay in Transportation**.—Mere proof of delay in transportation does not support an inference of negligence of the carrier, but slight evidence of negligence is sufficient to raise the inference that the delay was negligent.—Holland v. Chicago, R. I. & P. Ry. Co., Mo., 123 S. W. 987.

29.—**Mistake in Freight Rate**.—Action will not lie against carrier for breach of illegal contract to transport merchandise for less than usual rate, though the agreement was made by mistake.—Wentz-Bates Mercantile Co. v. Union Pac. R. Co., Neb., 123 N. W. 1085.

30.—**Ratification of Unauthorized Act**.—If a carrier's live stock agent did not have authority to make a contract with a shipper to ship by a certain train on a connecting line, the carrier ratified the contract by billing the car and forwarding it to its junction point for shipment on the connecting line.—Kirby v. Chicago & A. R. Co., Ill., 90 N. E. 252.

31. **ChamPERTY and Maintenance**—**Deed by Person not in Possession**.—Where a grantor's first deed was void of chamPERTY because of adverse possession, his subsequent deed to one in possession through a vendee, holding under another, conveyed the title.—Burke v. Scharf, N. D., 124 N. W. 79.

32. **Constitutional Law**—**Police Power**.—Hurd's Rev. St. 1908, c. 38, secs. 39d-39i, prohibiting manufacturers of imitation butter from using coloring matter, held a valid exercise of the police power to prevent fraud, and did not deprive the manufacturer of property without due process of law.—People v. Freeman, Ill., 90 N. E. 366.

33. **Contempt**—**Improper Statement in Brief**.—Language used by an attorney in a brief in support of a motion for rehearing held contemptuous to such an extent as to require the Supreme Court to take notice thereof and apply the necessary disciplinary penalty.—In re Dunn, Neb., 124 N. W. 120.

34. **Contracts**—**Compensation**.—A credit on a building contract cannot be allowed defendant for the amount of land which it agreed to transfer to plaintiff, but which it never transferred.—

R. A. Sherman's Sons Co. v. Industrial & Mfg. Co., Conn., 74 Atl. 773.

35.—**Construction**.—Under a contract for the construction of a railroad, by which the contractor was to be paid the cost of all labor and material furnished and a per cent thereon as profit, he is not entitled to charge as a part of the cost a sum for the depreciation of the equipment used in doing the work.—Savannah, A. & N. Ry. Co. v. Oliver, U. S. C. C. of App., Fifth Circuit, 174 Fed. 140.

36.—**Performance**.—Where a contract required plaintiff to construct for a stated price a sewer, that, by a mistake in the plan, plaintiff was not obliged to dig as deep as was contemplated by the parties, did not absolve defendant from paying the full contract price.—Business v. Boyers, Mo., 123 S. W. 956.

37. **Convicts**—**Admissibility of Evidence**.—On the trial of a person who, while undergoing a life sentence committed an assault which under Pen. Code, sec. 246, is punishable by death, the record of the former commitment is admissible.—People v. Oppenheimer, Cal., 106 Pac. 74.

38. **Corporations**—**Business Corporations**.—A "business corporation" held to include a corporation organized to engage in the business of manufacturing, selling, and distilling intoxicating liquors, etc.—Greenough v. Board of Police Com'r's of Town of Tiverton, R. I., 74 Atl. 785.

39.—**Misrepresentations in Sale of Stock**.—The president of a corporation, in negotiating the sale of treasury stock thereof, held to act within the scope of his employment, so that fraudulent representations made in respect thereto would bind the corporation.—Weissinger Tobacco Co. v. Van Buren, Ky., 123 S. W. 289.

40.—**Purchase of Stock**.—The rights of creditors not being involved, an agreement to refund money paid a corporation for stock if, after inspection of its property, the purchaser be dissatisfied is enforceable.—Dickinson v. Zubiate Mining Co., Cal., 106 Pac. 123.

41.—**Ultra Vires Contracts**.—A manufacturing corporation, organized under the law of Illinois, having no power under its charter to invest in the capital stock of another corporation, cannot be held liable as a stockholder in a corporation of another state, although it acquired the stock in payment of a pre-existing debt for merchandise sold by it in the course of its regular business.—Converse v. Gardner Governor Co., U. S. C. C. of App., Seventh Circuit, 174 Fed. 30.

42.—**Ultra Vires Contracts**.—When a contract is beyond the power conferred on a corporation by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it or by acting on it to show that it was prohibited by those laws.—Converse v. Emerson, Talcott & Co., Ill., 90 N. E. 269.

43. **Courts**—**Diversity of Citizenship**.—Where a citizen of the same state as the defendant is a necessary party plaintiff to a suit in a federal court when it is commenced, the court does not acquire jurisdiction because at some time during the pendency of the suit he may cease to be a necessary party.—Adams v. City of Woburn, U. S. C. C., 174 Fed. 192.

44.—**Full Faith and Credit**.—Where an insurance company issues a policy on property in another state in which it is authorized to do business, the courts of the state of residence of the company, in rendering judgment against it, do not fail to give full faith and credit to the public acts and judicial proceedings of the other state.—Strampe v. Minnesota Farmers' Mut. Ins. Co., Minn., 123 N. W. 1083.

45. **Covenants**—**Persons Entitled to Enforce**.—A grantee cannot enforce the covenants in his grantor's deed or any prior deeds, after he has conveyed the land, at least until he has satisfied his liability on his own covenants.—Simons v. Diamond Match Co., Mich., 128 N. W. 1132.

46.—**Running With the Land**.—In a contract for the sale of real estate, binding upon the heirs, executors, and assigns of the parties, a covenant by the purchaser to keep buildings in repair is one running with the land and bind-

ing on his assignee.—*Mesa Market Co. v. Crosby*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 96.

47. Damages—Personal Injuries.—The damages to be awarded for a negligent personal injury resulting in a diminution of earning power is a sum equal to the present worth of such diminution, and not its aggregate for plaintiff's expectancy of life.—*O'Brien v. J. G. White & Co.*, Me., 74 Atl. 72.

48.—Pleadings.—Plaintiff, by specifying the particular damages which he suffered from personal injuries, to some extent at least, negatived any claim for damages other than those specified.—*Keefe v. Lee*, N. Y., 90 N. E. 344.

49. Death—Presumption.—In an action on a benefit certificate, the court did not err in charging that a presumption of death arose after absence for seven years, under stated circumstances.—*Behlmer v. Grand Lodge, A. O. U. W. of Minnesota*, Minn., 123 N. W. 1071.

50. Deeds—Construction.—A deed of property to a husband and wife during their or either of their natural lives, and in fee to their heirs, construed and held, under the law of Illinois, to convey estates for life to the husband and wife, and to vest the fee in the children of the marriage as tenants in common.—*Hall v. Hankey*, U. S. C. C. of App., Seventh Circuit, 174 Fed. 139.

51.—Persons Affected.—The owner of land under an unrecorded deed is not affected by a judgment in a subsequent action, to which she was not a party, against her grantor for the recovery of such land.—*Temple v. Osburn*, Or., 106 Pac. 16.

52. Divorce—Abatement.—An action for divorce pending at or reopened after the death of one of the parties is abated by the death and fails because the marriage relation which is the subject-matter of the action has ceased to exist.—*Hite v. Mercantile Trust Co.*, Cal., 106 Pac. 102.

53.—Extent of Relief.—Where, in a suit for divorce for extreme cruelty, complainant proved the grounds alleged, it was error to deny her relief because she had been twice previously divorced and once because of her own adultery.—*Orton v. Orton*, Mich., 123 N. W. 1103.

54. Drains—Payment of Expenses.—The Legislature, in providing for the organization of drainage districts, held authorized to require persons performing services in the organization of districts to wait for their fees until the taxes provided for by the act may be collected.—*State ex rel. Applegate v. Taylor*, Mo., 123 S. W. 892.

55.—Right of Abutting Owners.—An owner of land abutting a highway held to have acquired no prescriptive rights to have a drain maintained at a certain size, and hence the county authorities had the right to enlarge the drain.—*Smith v. Barrett*, Mich., 123 N. W. 1091.

56. Easements—Water Rights.—Grantor reserving water rights, but not their exclusive use, cannot complain of the continued use of the water right by its grantees after conveyance to a third party.—*Sheffield Water Co. v. Elk Tanning Co.*, Pa., 74 Atl. 742.

57.—Way of Necessity.—The owner of the servient estate has a right to locate a way of necessity across his land in favor of another.—*Moore v. White*, Mich., 124 N. W. 62.

58. Eminent Domain—Damages.—Any damage to trees growing on a strip taken may be considered a diminution in value of interest of the owner of the land.—*Tri-State Telephone & Telegraph Co. v. Cosgriff*, N. D., 124 N. W. 75.

59. Equity—Pleadings.—Where a federal court of equity ordered a motion to strike a bill from the files converted into a demurrer instanter, it was error to sustain it without setting it down for hearing at a future day.—*Robinson v. Chicago Rys. Co.*, U. S. C. C. of App., Seventh Circuit, 174 Fed. 40.

60. Evidence—Judicial Notice.—Courts may take judicial notice that potatoes are subject to decay, and that in the latter part of April it would not be good business policy for a farmer to hold a large quantity of them on hand.—*James Higgins Co. v. Torwick*, Or., 106 Pac. 22.

61. Execution—Levy on Non-Resident's Property.—For purposes of execution or attachment

the situs of shares of stock is within the state where the corporation resides, and they may lawfully be levied on in such state though owned by a non-resident.—*Wait v. Kern River Milling, Milling & Developing Co.*, Cal., 106 Pac. 98.

62. Executors and Administrators—Claims Against Estate.—A grandfather and his granddaughter who grew up in his family held presumed the one to have furnished necessities and comforts, and the other to have rendered services, gratuitously.—*Lewis v. Horshey*, Ind., 90 N. E. 332.

63. Fires—Independent Contractors.—Comp. Laws 1897, secs. 11,653-11,658, providing that a landowner should be liable for fires communicated to other land, held not to render the owner liable for fires caused by independent contractors.—*Rogers v. Parker*, Mich., 123 N. W. 1109.

64. Fire Insurance—Right of Action.—Action may be maintained in the state against an insurance company of the state on a loss in another state in which it is unauthorized to do business.—*Strampe v. Minnesota Farmers' Mut. Ins. Co.*, Minn., 123 N. W. 1083.

65. Fraud—Remedies.—Where plaintiff was induced to surrender his interest in certain notes for worthless stock of a corporation, by defendant's false representations, he could either rescind and recover the notes or sue for damages for deceit.—*Bechtel v. Chao*, Cal., 106 Pac. 33.

66. Frauds, Statute of—Contract to Devise.—Where children conveyed to their father a life estate in land, in consideration of his agreement to leave them other land at his death, the contract was not within the statute of frauds.—*Ruch v. Ruch*, Mich., 124 N. W. 52.

67.—Estoppel.—The doctrine that equity will hold one estopped from relying on the statute of frauds, where to do so will amount to the practice of fraud, is not limited in its operation to any particular class of contracts, but applies in every transaction where the statute is invoked.—*Seymour v. Oelrichs*, Cal., 106 Pac. 88.

68. Fraudulent Conveyances—Transfer of Crop.—A wife's possession of crop, transferred to her by her husband in satisfaction of her rent lien, held to preserve the lien as against his creditors, though the transfer was unrecorded.—*Jones v. Louisville Tobacco Warehouse Co.*, Ky., 123 S. W. 307.

69. Guaranty—Requisites.—A parol statement by a person to the president of a bank that he "was going to give a guaranty" to protect the bank in its transaction with a corporation held not to constitute a guaranty.—*National Bank of Commerce of Kansas City*, Mo., v. *Rockefeller*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 22.

70. Homestead—Alimony.—The court directing the enforcement of an order for the payment of alimony held authorized to direct a sale of the real estate under execution.—*Bobowski v. Bobowski*, Ill., 90 N. E. 361.

71. Homicide—Manslaughter.—To reduce a homicide from murder to manslaughter, it is, in general, only necessary that accused's reason should be impaired to such an extent as might induce an ordinary man of fair average disposition to act without due deliberation.—*People v. Poole*, Mich., 123 N. W. 1093.

72. Husband and Wife—Post Nuptial Contract.—Notwithstanding the married woman's act (Rev. St. 1893, sec. 4335, Ann. St. 1906, p. 2378), persons seeking to sustain a postnuptial contract purporting to release the wife's interest in her husband's estate have the burden of showing that no unfair advantage was taken of the wife.—*Egger v. Egger*, Mo., 123 S. W. 928.

73.—Wife's Conveyance of Expectancy.—A married woman's deed, attempting to convey her expectancy as heir of her father, held void for want of statutory authority.—*Taylor v. Swafford*, Tenn., 123 S. W. 350.

74. Intoxicating Liquors—Sale Without License.—The holder of a license to sell liquor in specified quantities to be drunk on the premises is guilty of selling without a license if he sells in those quantities to be drunk off the premises.—*State v. Fagan*, Del., 74 Atl. 692.

75. Judgment—Diversity of Subject Matter.—A judgment, in an action for admeasurement of dower, does not bar a subsequent action against the same defendants to set aside a postnuptial contract between the widow and decedent, and to recover a child's share in decedent's personal estate.—*Egger v. Egger*, Mo., 123 S. W. 928.

76.—Jurisdiction.—The judgment of a court of record of another state in a divorce case is entitled to the presumption that it was authorized by law, provided jurisdiction of the subject-matter may be assumed.—*In re Hancock's Estate*, Cal., 106 Pac. 58.

77. Landlord and Tenant—Action for Rent.—A lessor of a building for a theater, suing for rent after the lessee vacated the premises on the ground of his inability to book performances on account of the condition of the building, may not rely on the fact that firemen placed by the fire marshal on the premises were trespassers.—*Norris v. McFadden*, Mich., 124 N. W. 54.

78.—Contracts of Sale.—A provision of a contract for the sale of real estate that, on default of the purchaser in possession, the contract shall be converted into a lease and any payments or improvements made be considered as rental, is valid and enforceable.—*Mesa Market Co. v. Crosby*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 96.

79.—Dangerous Premises—Repairs on rented premises.—Repairs on rented premises accomplished by the landlord held so negligently done as to make the landlord liable for injuries to the tenant occasioned thereby.—*Carlton v. City Sav. Bank of Omaha*, Neb., 124 N. W. 91.

80.—Lease.—Where an optional term in a lease was to extend "not exceeding ten years," a written notice by the tenant was not necessary to establish his election to continue.—*Briggs v. Chase*, Me., 74 Atl. 796.

81.—Leases.—A lease of the basement and lower floor of a building with the right to erect signs on the roof held not to confer on the lessee the right to lease the use of the roof to others for the maintenance of signs for profit.—*Forbes v. Gorman*, Mich., 123 N. W. 1089.

82. Larceny—Possession of Stolen Property.—Evidence of possession by defendant of property recently stolen is not admissible for the purpose of showing the fact that the property was stolen.—*Robinson v. State*, Wyo., 106 Pac. 24.

83. Life Insurance—Payment of Assessment.—When a member, on receiving notice of an assessment remitted for it, the secretary of the association could not apply the remittance to payment of a prior assessment.—*Burchard v. Western Commercial Travelers' Ass'n*, Mo., 123 S. W. 973.

84.—Suicide.—Whether or not an insured, who died from the effects of an overdose of morphine, took the overdose accidentally, or with suicidal intent, so as to release the insurance company from liability on its policy under its terms, is a question of fact which, unless the evidence is conclusive, is for a jury to determine.—*Metropolitan Life Ins. Co. v. Williamson*, U. S. C. C. of App., Fifth Circuit, 174 Fed. 116.

85.—Waiver of Forfeiture.—Where an insurance company waived payment of the premium due on a certain day and accepted payment on the next day, there was no forfeiture because of the delay in payment and no new contract made between the parties, but the old policy remained in force.—*Monahan v. Fidelity Mut. Life Ins. Co.*, Ill., 90 N. E. 213.

86. Limitation of Actions—Assessments by Receivers.—Limitations begin to run against assessments levied against members and policy holders of an insurance company by its receiver from the mailing of the notice thereof.—*Pratt v. Broadwell*, Mich., 124 N. W. 44.

87. Logs and Logging—Growing Timber.—Growing timber, though separated, so long as it remains uncut can only be conveyed in accordance with the rules for conveyance of real estate.—*Brown v. Bishop*, Me., 74 Atl. 724.

88. Master and Servant—Dangerous Ways.—A railroad company's liability to keep a path

in the yard reasonably safe for employees did not include an obligation to guard an employee while standing between certain freight cars outside the path to permit the passage of a passenger train on another track.—*Langenfeld v. Union Pac. R. Co.*, Neb., 123 N. W. 1086.

89.—Defective Appliances.—To recover for injuries caused by defective appliances, an employee must show that the employer had actual or constructive knowledge of the defect long enough before the accident to repair it or warn employees, and failed to do so.—Chicago, I. & L. Ry. Co. v. Wilfong, Ind., 90 N. E. 307.

90.—Contract of Employment.—Where a servant under a time contract of employment is discharged without cause, he may recover the entire compensation remaining unpaid.—*Rose v. Williamsville G. & St. L. Ry. Co.*, Mo., 123 S. W. 946.

91.—Negligence.—In absence of experience indicating danger or of custom of persons engaged in the business, master held not bound to inspect excavation for gas.—*State v. Flanagan*, Md., 74 Atl. 818.

92.—Negligent Fires.—A landowner who licenses others to clear up his wild land at so much per acre is not liable for fires set by the licensees of which he has no knowledge.—*Rogers v. Parker*, Mich., 123 N. W. 1109.

93.—Safe Appliances.—A master who sanctions the continuous use of an appliance by his employees for a purpose different from the one it was designed for must exercise care to have the appliance reasonably safe.—*McCaffrey v. Tamm Bros. Glue Co.*, Mo., 123 S. W. 944.

94. Mines and Minerals—Gas and Oil Lease.—Delay of lessee's assignee, under an oil and gas lease, in marketing gas from a well drilled and in drilling other wells on the leased premises for four years, held unreasonable.—*Howerton v. Kansas Natural Gas Co.*, Kan., 106 Pac. 47.

95. Municipal Corporations—Defective Streets.—A grating projecting only two inches or less above a sidewalk held as a matter of law not to render it not reasonably safe for public travel.—*Northrup v. City of Pontiac*, Mich., 123 N. W. 1107.

96.—Irregular Contract.—A party contracting with a city regarding a subject-matter within the scope of the city's power may, where he has received the benefit of the contract, be precluded from asserting that the contract was not on the part of the city executed in the manner required by law.—*City of Arcata v. Green*, Cal., 106 Pac. 86.

97.—Ordinances Invalid in Part.—The invalidity of a part of an ordinance or a contract under it embodying its terms does not necessarily make the whole void, unless made void by statute.—*Gist v. Rackliff-Gibson Const. Co.*, Mo., 123 S. W. 921.

98.—Removal of Officer Under Civil Service.—Civil Service Act, sec. 12 (Hurd's Rev. St. 1908, c. 24a), prohibiting the removal of an officer appointed under the rules of the civil service commission except for just cause and for reasons given the commission in writing, and with an opportunity to be heard, held not to prohibit the removal of officers not so appointed, such as a police desk sergeant, without written charges or hearing.—*People v. City of Chicago*, Ill., 90 N. E. 259.

99. Navigable Waters—Riparian Rights.—The maintenance of a houseboat on a navigable slough cannot be restrained by an abutting landowner.—*Salene v. Isherwood*, Or., 106 Pac. 18.

100. Partition—Homestead.—The homestead vests on the death of the owner in his widow and his infant children, and partition does not lie until the youngest child becomes of age.—*Scott v. Royston*, Mo., 123 S. W. 454.

101. Principal and Surety—Payment by Surety.—A deposit of money in court by a surety in payment of a judgment against him on the debt held to discharge the principal's liability pro tanto so as to entitle the surety to recover against the principal.—*Vermeule v. York Cliffs Improvement Co.*, Me., 74 Atl. 800.

102. Public Lands—Transfer of Rights.—An owner of land within a forest reservation, who

has conveyed the same to the United States under the provisions of Act June 4, 1897, c. 2, may lawfully transfer his right to land which he is entitled to select in exchange and a grantee acquiring such right in good faith, although before the selection has been approved, on such approval and the issuance of a patent, acquires the title as a bona fide purchaser.—*United States v. Hyde*, U. S. C. C., W. D. Wash., 174 Fed. 175.

103. **Railroads—Crossing Accidents.**—A person about to cross railroad tracks is bound to approach the tracks with care proportionate to the danger, though gates are maintained.—*Carlton v. Grand Trunk Western Ry. Co.*, Ill., 90 N. E. 201.

104.—**Injuries to Passengers.**—Passenger getting into controversy with a brakeman and striking him held not entitled to recover for ensuing injuries.—*Arnold v. Atchison, T. & S. F. Ry. Co.*, Kan., 106 Pac. 42.

105.—**Lighting Station Platform.**—Where a carrier had acknowledged that there would be passengers for a train leaving a flag station at 10:26 p. m., it was its duty to light the station platform for a reasonable time before arrival of the train.—*Cleveland, C. C. & St. L. Ry. Co. v. Harvey*, Ind., 74 Atl. 318.

106.—**Right-of-Way.**—A landowner who has granted a railroad company the right to construct a switch track across his property held entitled to restrain the extension of the track beyond the point named in the contract.—*Barth v. Pittsburgh, C. C. & St. L. Ry. Co.*, Ind., 90 N. E. 322.

107. **Rape—Previous Unchastity.**—In a prosecution for carnally knowing a female under sixteen years of age, held, that proof that she was unchaste before or after the alleged assault was inadmissible as a defense.—*State v. Rivers*, Conn., 74 Atl. 757.

108. **Removal of Causes—Diversity of Citizenship.**—Under the statutes of New Jersey, which provide for making a mortgagee a party to a proceeding for the condemnation of land for public use, both owner and mortgagor are indispensable parties and interested in the same questions, and the cause is not removable by the owner, on the ground of diversity of citizenship, where the mortgagor is a citizen of the same state as the petitioner.—*Fishblatt v. Atlantic City, U. S. C. C. D. N. J.*, 174 Fed. 196.

109. **Sales—Performance of Contract.**—Where defendant notified plaintiff that it did not intend to make further deliveries under its contract to sell plaintiff the output of its mill, suit by plaintiff for breach of the contract would not be a waiver of performance of the contract by defendant.—*Chicago Title & Trust Co. v. Sagola Lumber Co.*, Ill., 90 N. E. 282.

110.—**Severable Contracts.**—When the price of goods is expressly apportioned by the contract, or the apportionment may be implied by law to each item to be performed, the contract will generally be held to be severable.—*Los Angeles Gas & Electric Co. v. Amalgamated Oil Co.*, Cal., 106 Pac. 55.

111.—**Warranty.**—Where defendant sold plaintiff a horse without a warranty and it proved unsound, if plaintiff had any remedy, it was for fraud and deceit.—*Sockman v. Keim*, N. D., 124 N. W. 64.

112.—**Worthless Article.**—Where an article sold is wholly worthless, the defense of total failure of consideration may be shown, even though there has been no return, or offer to return, the article, and no notice given to the effect that it is without value.—*Buss v. Allison Window Glass Co.*, Mo., 123 S. W. 949.

113. **Searches and Seizures—Unreasonable Searches.**—The taking of testimony for a civil case in an orderly and regular way does not amount to a search or a seizure within the constitutional provisions against unreasonable searches of papers and effects.—*Finn v. Winnesheik Dist. Court*, Iowa, 123 N. W. 1066.

114. **Sequestration—Recovery of Corporate Books.**—A writ of sequestration held to have been properly issued against the books and papers of an insolvent corporation which the officers were required to deliver to its receiver, but which they refused to do.—*Manning v. Mercantile Securities Co.*, Ill., 90 N. E. 238.

115. **Statutes—Interpretation.**—Laws are presumptively passed in a spirit of justice and for the welfare of the community, and must be so interpreted, if possible, as to further that purpose.—*Gist v. Rackliffe-Gibson Const. Co.*, Mo., 123 S. W. 921.

116. **Stipulations—Pleadings.**—Where pleadings were lost before a second trial, held that the parties could stipulate that the pleadings had been properly abstracted on the appeal from the former judgment, and that the case might proceed as if the pleadings were in court.—*Bladeg v. Des Moines City Ry. Co.*, Iowa, 123 N. W. 1057.

117. **Street Railroads—Injury to Alighting Passengers.**—A passenger may start to alight without any further invitation than the stopping of a car at a regular stopping place for passengers.—*Indianapolis & M. Rapid Transit Co. v. Walsh*, Ind., 90 N. E. 138.

118.—**Riding on Foot-Board.**—Where a street car is crowded, standing on the foot-board is not, of itself, negligence on the part of a passenger.—*Math v. Chicago City Ry. Co.*, Ill., 90 N. E. 235.

119. **Subrogation—Guarantor.**—A bank, to which collateral was pledged to secure a note "and any and all other indebtedness" which the pledgor might owe it, held entitled to retain the collateral as security for other indebtedness as against a guarantor who paid such note.—*National Bank of Commerce of Kansas City, Mo. v. Rockefeller*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 22.

120. **Taxation—Foreclosure Under Tax Lien.**—Where a decree foreclosing a tax lien is void for want of service, an action to redeem may be maintained against the purchaser under such void decree, and those claiming under him.—*Herman v. Barth*, Neb., 124 N. W. 135.

121.—**Inheritance Taxes.**—Pub. Acts 1903, p. 286, No. 195, sec. 17, relating to inheritance taxes, held not to affect the construction of the statute that debts secured by mortgages should be deducted from the personalty in determining its value.—*In re Fox's Estate*, Mich., 124 N. W. 60.

122. **Trial—Instructions.**—The practice of giving a large number of instructions containing general principles of law which will not particularly explain the law applicable to the facts in issue should not be favored.—*Asmussen v. Swift & Co.*, Ill., 90 N. E. 250.

123. **Trusts—Power of Trustees.**—Executors and trustees empowered by will to sell real estate held not authorized to delegate the power to an agent.—*Coleman v. Connolly*, Ill., 90 N. E. 278.

124.—**Resulting Trusts.**—If one furnishes the means to buy property, and the title is taken in the name of another, the law ordinarily raises a resulting trust.—*Maciejewska v. Jarzembek*, Ill., 90 N. E. 231.

125. **Vendor and Purchaser—Champertous Deed.**—Where a deed attempting to convey an outstanding title to a vendee in possession was champertous, it did not constitute a constructive eviction entitling him to retain possession under such title as against the vendor.—*Burke v. Scharf*, N. D., 124 N. W. 79.

126. **Witnesses—Cross-Examination.**—Papers which were handed to a witness on cross-examination to prove their issuance by a public officer, after which they were marked for identification, could not be inquired into on redirect examination by the state, not having been offered in evidence, but merely marked for identification.—*State v. Fagan*, Del., 74 Atl. 692.

127.—**Cross-Examination.**—It is beyond the limits of a proper cross-examination to permit accused to be asked as to other arrests for other offenses without giving him the opportunity to answer as to his guilt.—*State v. Nyhus*, N. D., 124 N. W. 71.

128.—**Privilege.**—A witness cannot refuse to testify on the ground that his answer might incriminate him unless the court can see that there is reasonable ground to apprehend such danger.—*Manning v. Mercantile Securities Co.*, Ill., 90 N. E. 238.

Central Law Journal.

ST. LOUIS, MO., APRIL 1, 1910

THE MUNICIPAL COURT ACT—FOUNDED IN MISCONCEPTION OF FUNDAMENTAL PRINCIPLES OF PROCEDURE.

The National Corporation Reporter is not so optimistic as to the operation of the Municipal Court Act of Chicago, as it was in 1908, when its merriment was aroused at some comments of ours (67 C. L. J., p. 393), made in reference to that Act. Our response to the Reporter remains unanswered.

But the appellate court has given the Reporter an astonishing shock in the recent case of *Hurford v. Josie*, from which it appears that the construction of the Act in question is coming our way. This case seems to vindicate our prediction that the Act in question would be construed to conform to the necessities of fundamental law. In our article we referred to Mr. Hughes' definition of pleadings in his Section III, 1st Grounds and Rudiments. See, also, Sections 169, 273, Id.; also title Illinois, second Id.; also leading cases, 298, 299, third Id.

The case of *Hurford v. Josie* is not at hand. 139 Nat'l. Corp. Rep., p. 569, refers to that case and the observations allow us to conclude that the Municipal Court Act is faring badly from construction in the appellate court, as the Reporter views it. From what the Reporter informs us, we are not prepared to criticise the decision. Just now it looks as if the court was inclined to view the matter of the bill of exceptions, which Mr. Hughes calls the statutory record, as it most always has, and to continue to hold that all waivable matter will be viewed as abatement or dilatory matter; all agreeably to the dictates of *Interest reipublicae ut sit finis litium*. This maxim was cited with approval in *Vallandingham v. Ryan*, 17 Ill. 25; also in late cases.

Matter that the parties can waive is not, and never has been, treated with grace by able courts. It is the set policy of courts to give it the go-by and not extend to it liberal favor and thus delay cases in final disposition upon their merits, or, in other words, upon matters of substance. The matter of the statutory record is formal or waivable matter and courts will apply waiver to it, if possible. Section 103, 1 Hughes' Grounds and Rudiments. Presumptions are against the matter of the statutory record. This matter must in all cases be presented with precision and certainty; it must be attended with certificates that "this was all the evidence." *Mallers v. Whittier Co.*, 170 Ill. 434. This argument is in accord with the presumption of regularity, which is in favor of a judgment after it is shown to be founded upon a record that will stand the test of a *coram judice* proceeding. Bro. Max., 949 (8th Ed.). After such a record is demonstrated, then every presumption is in favor of the judgment. It cannot be reversed upon the matter of the statutory record unless the latter record has been carefully preserved by the party offering it, at each step of the case, by objection, exception, motion for new trial, assignment of error and argument on appeal; this record has never been viewed with favor because of a policy issuing from *Interest reipublicae*, etc. This is a principle of the prescriptive constitution and neither written constitutions nor statutes can abolish it. It is a principle often ignored and denied, but there is more to vindicate it in every jurisdiction than to imitate it. Such maxims are landmarks set by antiquity for posterity and cannot be changed, much less removed. And so the appellate courts will decide in defining the operation of the Municipal Court Act of Chicago.

There is much in evidence to show that Illinois is in a perturbed condition judicially, as are also nearby and adjacent states, including Missouri. There are both pessimists and optimists in these states; all admit that the condition is bad and is becom-

ing intolerable. The former declare that the legal profession is submerged beyond redemption, while the latter, with whom we stand, insist that it can be uplifted. But the uplift will not come from legislative action, but from a right comprehension of fundamental principles. Literature that affords and elucidates these principles is what is needed. It is pitiable to see the destinies of a world's metropolis guided by supposed high authorities that do not understand organic law, and laboring under the belief that any real or permanent good can come from statutes except as they may be construed to facilitate—never to hinder—the enforcement of maxims whose existence from antiquity is proof that they are *the law*. Before any permanent good can come from attempted legal reform, the reformer must understand that the courts will not and cannot allow statute law to override the fundamental law expressed in the maxims and in accordance with which the operations of the human mind must, by their very nature, be carried on.

Illinois will do well to follow the example of Connecticut which adopted the English Judiciary Act. This Act gives the Supreme Court power to prescribe rules of court, or, in other words, to enact a Judicial Code for guidance to juridical ends. This would dispose of what the Reporter now informs us must next be done for the Chicago Act—take it back to the legislature for more patch-work and for further experiments. Instead of this, how much better would be ordinances of the Supreme Court regulating procedure in courts of justice.

Look at the great good that has come from Lord Bacon's ordinances governing the High Court of Chancery; and then look what the courts have been compelled to do to codes of procedure in American states. These codes have become veritable Babels in various states. We leave it to the Reporter to inform us what it is that has been given to Chicago in the Municipal Court Act.

NOTES OF IMPORTANT DECISIONS.

WATERS AND WATER COURSES—RIGHTS OF SURFACE OWNER IN UNDERGROUND STREAMS AND PERCOLATING WATERS FOR IRRIGATING PURPOSES.—The words "riparian owner" have been deemed at common law to refer to the rights which belong to the owner of land bordering on or inclosing a stream. The general right is crystallized in the maxim *aqua debet currere ut currere solebat*. But in the law of irrigation a riparian owner is not necessarily one whose land bounds a surface stream, but he may be the owner of land with a subterranean stream contributing its supply to a surface stream. *Hudson v. Dailey* (Cal.), 105 Pac. 748.

In a controversy between the owner of land through which a surface stream ran and defendants whose lands, some by underground streams and others by percolating waters, contributed to the surface stream, the former's prescriptive right in use was invoked against the latter.

The court held that lands abutting the stream and lands supplying it by underground streams were equally riparian and equally entitled to the use of the water which made the surface stream, the rights of each being limited to reasonable needs. As to prescriptive right in a stated quantity, the court, in speaking of water drawn to the surface from an underground stream, as flowing out of artesian wells, thus discourses: "Her (plaintiff's) use of the water, after it had passed through their lands and become part of the surface stream, would not injure them, nor constitute a trespass upon their property, and hence it would not be adverse to them and could not be the foundation of a title by prescription as against them." This same kind of reasoning could be advanced in favor of an upper riparian right in a surface stream, and herein statutory appropriation may have a better standing than a right arising out of prescriptive use.

The lands of defendants through which water percolated into the surface stream were held not to be riparian, but the same doctrine of reasonable use was applied to them.

Therefore, as to a mere prescriptive right subterranean streams and percolating waters are so far as the rights of a user from the surface stream are concerned on the like footing, but we imagine that as to statutory appropriation of water in the surface stream, they would be differently regarded.

As to percolating waters, it is said: "The owner of land has a natural right to the reasonable use of the water percolating therein, although it may be moving through his land

into the land of his neighbor, and although his use may prevent it from entering his neighbor's land or draw it therefrom. The right arises from the fact that the water is there in his land so that he may take it without trespassing upon his neighbor. His ownership of the land carries with it all the natural advantages of its situation and the right to a reasonable use of the land and everything it contains, limited only by the operation of the maxim, *sic utere tuo ut alienum non leadas.*" But it is a new adaptation of this maxim to say that if I use my own my neighbor cannot use it. This is contrary to law, and it is not a correct one. The court, however, says, the maxim means I shall not waste my own, though the manner of the waste does not hurt my neighbor. I can only use it for my reasonable needs. This maxim did not contemplate the use of such property as depends for its existence on location rather than in essence.

The extension of the maxim, however, is interesting.

ABSTRACTS OF TITLE—LIABILITY OF SURETY ON BOND OF PUBLIC ABSTRACTER.—The laws of Oklahoma require of persons, firms and corporations in the business of abstracting titles the giving of a bond, respectively, in the sum of \$5,000, conditioned upon damages for mutilation, etc., of records, and for damage "to any person or persons for whom he or they may compile, make or furnish abstracts of title to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation, in compiling said abstract."

In *Walker v. Bowman*, 105 Pac. 649, the Oklahoma Supreme Court held, that where a customer relying on an abstract furnished him by defendant abstracter sold property, under an abstract showing it was free of liens, and the purchaser, in order to protect same from a lien that the abstract should have shown, was compelled to pay a certain amount to displace said lien, and thereby the plaintiff customer "became liable to pay" said purchaser the amount he was compelled to pay, a demurrer to a petition setting up these facts was demurral as stating no cause of action.

The theory of the court was that there was here stated a "mere apprehension" that the customer would be called upon to pay his purchaser.

We think the court held quite narrowly on this question, and that the cases it cited are by the ruling very greatly extended. Let us illustrate a moment. The property sold was encumbered by a lien. With it unforeclosed

there would exist a "mere apprehension" of damage. With judgment of foreclosure thereon damage is actually suffered, because there is a fixed liability on the property, and substantial damage has been sustained. Still, however, it might be claimed that not yet has the seller, who is plaintiff, suffered actual damage. Let us see. The petition states the purchaser has paid off the lien, and thereby the seller has become liable to pay the purchaser. Is it not the suffering of substantial damage, for one to have become definitely liable, in contract? Suppose the seller had given to the purchaser his promissory note to pay, would not the damage have accrued? But how would he be more conclusively liable than he is. The note would simply displace the warranty clause.

The argument of the court seems in its final analysis to deny to the customer even the privilege of settling this liability without first suffering judgment and a showing that he was compelled to pay under legal duress.

We think it not good doctrine to say damage has not been suffered by a contingency the happening of which creates an indisputable liability arising *ex contractu*.

In our annotation in 69 Cent. L. J. 378-381, on abstracts of title, we cited authority to the effect that damage does ensue giving a purchaser *prima facie* right to sue, though he has neither exhausted his remedy against his warrantor nor averred his insolvency. *Harrison v. Ward*, 87 Pac. 171. See other cases also here cited.

It seems to us that this class of bonds being exacted by statute for the protection of the public, do not require the ordinary construction of *strictissimi juris* in favor of surety.

AUTOMOBILES VIEWED AS DANGEROUS MACHINES AND RULE OF NEGLIGENCE DEPENDENT THEREON.—The automobile decisions are about as variant and conflicting as any lover of "the glorious uncertainty of law" could desire. But the trend of cases seems getting more favorable. We quote from the recent case decided by the Wisconsin Supreme Court, of *Steffen v. McNaughton*, 124 N. W. 1016, embracing its supporting authority:

"When properly handled and used, automobiles are as readily and effectually regulated and controlled as other vehicles in common use, and, when so used, they are reasonably free from dangers. The dangers incident to their use as motor vehicles are commonly the result of the negligent and reckless conduct of those in charge of and operating them, and do not inhere in the construction and use of the vehicles. It is well known that they are being devoted to and used for the purposes

of traffic and as conveyances for the pleasure and convenience of all classes of persons and without menace to the safety of those using them or to others upon the same highway, when they are operated with reasonable care. The defendant cannot, therefore, be held liable upon the ground that the automobile is a dangerous contrivance. This view has been adopted by the courts in the following cases: *Slater v. Advance Thresher Co.*, 97 Minn. 305, 107 N. W. 133; *McIntyre v. Orner*, 166 Ind. 57, 76 N. E. 750, 4 L. R. A. (N. S.) 1130, 117 Am. St. Rep. 359; *Lewis v. Armours*, 3 Ga. App. 50, 59 S. E. 338; *Jones v. Hoge*, 47 Wash. 663, 92 Pac. 433, 14 L. R. A. (N. S.) 216, 125 Am. St. Rep. 915; *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Supp. 1057."

We refer our readers to annotation in 69 Cent. L. J. 360, on Responsibility of Owner of Automobile as Dangerous Machine.

INSURANCE — INCONTESTABILITY CLAUSE IN POLICY.—It has been frequently held that a clause in a life insurance policy that it "shall be incontestable, except for non-payment of premiums, two years from date," is enforceable, and this holding has been lately followed by the Supreme Court of New Jersey in *Drews v. Metropolitan L. Ins. Co.*, 75 Atl. 167.

The contention was advanced by the insurance company that, as the contract of insurance was obtained through fraud, the contract was void from the beginning, and, therefore, there was never any legal contract to which the agreed limitation could be applied.

The New Jersey court cites much authority for its conclusion that fraud is a defense, and the agreement was to impose a short statute of limitations for establishing it.

This seems something of a departure from the general rule that fraud vitiates all contracts, but the usual other rule applied is that of liberal construction in favor of the insured. It does not seem overharsh that an insurer should be held to obligate himself to look further into contracts for their invalidity or be considered to have waived them, instead of continuing to receive premiums and then begin to look for fraud when it is called on to pay. Certainly, if the company ascertained there was fraud and continued the insurance it ought to pay. If that be true, it could contract, for a consideration, that it should be taken to know there was fraud after a specified time, if any fraud in fact existed. Diligent search for fraud ought to ascertain its existence, or non-existence, in two years' time. There is no condonation of fraud in this sort of construc-

tion, for search for it and taking advantage thereof has a distinct recognition, if the insurer wishes to avail himself of it.

The court refers, as along the same line as its conclusion, *Wright v. M. B. L. Assn.*, 118 N. Y. 237, 6 L. R. A. 731; *Reagan v. Union Mut. L. Ins. Co.*, 189 Mass. 555, 96 N. E. 217, 2 L. R. A. (N. S.) 1821; *Royal Circle v. Achterath*, 204 Ill. 549, 68 N. E. 492, 63 L. R. A. 452, 98 Am. St. Rep. 224; *Murray v. State Mut. L. Ins. Co.*, 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742.

STATE LAW—ANOTHER OPENING FOR INDEPENDENCE IN CONSTRUCTION BY FEDERAL COURTS.—Mr. Justice Lurton handed down his first opinions in the federal Supreme Court on February 21, 1910. In the first of these, as they stand in 30 Sup. Ct. Reporter, he points out an apparently new reason for this court not following state construction of state law—though it be statutory. *Wright v. Georgia R. & B. Co.*, 30 Sup. Ct. 242.

In a suit for taxes by the state the extent of the exemption from taxation given in a railroad charter was being considered. The state claimed the question was res judicata, as shown by a former decision of the Georgia Supreme Court. The learned jurist first argues that while this former decision does construe the exemption as the state claims, yet the case going off "wholly upon the question as to whether the trial court had jurisdiction," the construction was obiter, then puts in an obiter himself, to which we especially call attention.

Supposing the Georgia decision not to be obiter, he remarks: "But in *Georgia R. & Bkg. Co. v. Wright*, 124 Ga. 596, the Supreme Court of Georgia seems to have definitely decided, that a judgment in a suit to collect a tax assessed for one year is not a bar to a suit for taxes subsequently assessed for another year, although the question decided in the first case is the same question upon which the second suit must be decided."

Then he observes that it is well settled that the federal Supreme Court accords to a judgment of a state only the effect which a court of the state gives to it, and, therefore, the prior decision, whether obiter or not, will not be regarded as controlling. That seems to us like grasping with something like desperation at a chance to disregard state ruling. Did the state court say, or mean to say, that what it had decided to be a vested right in an exemption statute was not a precedent just as much as its decision in regard to any other vested right? It only could have meant that a new levy of taxes is a new demand, and technically there being a new cause of action, or claim thereof,

res judicata could not be pleaded. It did not say it would not follow any principle settled by prior decision if it be shown applicable to the controversy before the court. Or if it did say that, Justice Lurton had need to set this out very clearly, and not as he has done. But even then he ought to have followed the latest expression of the Georgia Supreme Court and let the state's own court change its ruling, and not remit that duty to an outside tribunal. We have heard heretofore of the U. S. Supreme Court refusing to follow "oscillation in decision," and now comes another exception. Is it what Justice Holmes would call an arbitrary exception? Dissenting opinion in *Kuhn v. Fairmont Coal Co.*, 30 Sup. Ct. 140.

LAWS FOR THE GUARANTY OF BANK DEPOSITS.

This subject is treated at some length in a recent number of the current volume of the Central Law Journal,¹ where laws of that character enacted in two states, Nebraska and Oklahoma, are mentioned. Both states undertook to restrict the right to engage in banking to corporations, and the writer of the paper just referred to, takes the position that such restriction is contrary to the Fourteenth Amendment to the Federal Constitution, which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That amendment does not interfere with the police power of the states.² Mr. Justice Field, in *Bartemeyer v. Iowa*,³ said: "No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police power of the state." That being the interpretation placed upon the amendment, when it is invoked against a legislative act of a state the question is not merely whether such act deprives a citizen of some right theretofore

enjoyed, but whether it is within the legitimate exercise of the police power of the state. To determine this question there are two tests: First, Is the real object of the act a proper subject of legislative jurisdiction; Second, Are the means employed reasonably adapted to the end sought?⁴

Now as to the first test. It will be conceded that the business of banking is within the legitimate scope of legislative regulation. As was said in *People v. Utica Ins. Co.*:⁵ "It may safely be admitted that formerly the right of banking was a common right belonging to the individuals, and to be exercised at their pleasure. It cannot, however, admit of doubt that the legislature had authority to regulate, modify or restrain this right."⁶

Now as to the second test. Are the means employed reasonably adapted to the attainment of the end sought? The end sought is the regulation of banking in such a way as to better serve the public welfare. When we take into account the intimate relation between banking and the commerce of the country; the fact that bank paper in the form of checks and drafts have, to a large extent, superseded money as a medium of exchange in the commercial world; the

(4) "The police power, though not capable of definition within exact limits, covers a very large residuary power to legislate on all matters concerning the public health, safety, morals and general welfare. This necessarily vests in the legislative branch of the government a large amount of discretionary power, but despite the strong presumption in favor of the validity of a particular exercise, the courts do not hesitate to condemn a statute as unconstitutional when the legislature has clearly overstepped the bounds of the police power, and has thereby violated the citizen's constitutional rights. In determining this question, the courts have adopted two tests which must both be satisfied in order that the statute may be upheld as a legislative exercise of the police power: First, is the real object of the act a proper object of legislative jurisdiction? Secondly, are the means employed reasonably adapted to the attainment of the end sought? If both of these tests are satisfied, none of the citizen's guarantees of liberty and property are violated, as it is universally agreed that the rights secured by such guarantees, are not absolute, but are held subject to this broad jurisdiction of the police power." Vol. X, No. 1, p. 56, Columbia Law Review.

(5) 15 John. 353.

(6) See also, Freund, Police Power, Secs. 400-401.

(1) 70 C. L. J. 111.

(2) Slaughter House Cases, 16 Wall. 36.

(3) 18 Wall. 129.

shock to business when payment of such paper is suspended, even for a short period; then it is easy to understand, that one of the problems before the legislative mind, in framing a banking system is, not only, so far as possible, to insure solvency, but permanency, and their being open at all reasonable times for the transaction of business.

Restricting the business is reasonably calculated to serve those ends. It insures a union of capital, energy and intelligence. It insures permanence. The bank of an individual, of necessity, closes at his death, and its depositors must await the tedious procedure of the probate court to adjust their accounts. A corporation, for all practical purposes, is immortal, and exempt from the accidents of disease and death.⁷

Does a bank guaranty law take property without due process of law, is the second question asked by the writer of the article mentioned in the opening sentence of this paper. He denounces such a law as paternalism. Government is inherently paternal. Protecting a citizen in the enjoyment of his rights, instead of leaving him to protect himself, is one of the first effects of government, and is paternalism pure and simple. From protection against force the protection against imposition is not a far cry. If the act were designed merely to protect individuals from the consequences of their own indiscretion or lack of judgment or foresight, it might very properly be called paternalism. But there are certain classes of business in which the individual cannot quite pick and choose. It is a matter of public interest that a business of that character be so conducted that the individual dealing with those engaged in it may do so in confidence that it is honestly and prudently managed. It is not sound public policy to compel a traveler, upon

(7) Such restriction was upheld in State ex rel. v. Woddmanse, 1 N. Dak. 246; Meyers v. Irwin, 2 Searg. & R. 367-372. The principle was upheld in Commonwealth v. Vrooman, 164 Pa. St. 306; Brady v. Mattern, 125 Iowa, 158; Nance v. Hemphill, 1 Ala. 551. State v. Scougal, 3 S. Dak. 55, appears to be the only authority against the proposition and in view of a peculiar constitutional provision of that state, it is entitled to little weight.

reaching a strange city, to bicker over hack fare, hence such fares are generally a matter of municipal regulation. An individual might apply the proper tests and protect himself against impure food, but the government paternally steps in and protects him. The transaction of business would be seriously handicapped, were negotiations to be suspended pending an examination of the bank upon which the paper in payment was drawn.

Business has so adjusted itself that it is no longer optional with the individual whether or no to deal with a bank. It might be a matter of small consequence to the public at large for one individual to lose his money through a bank failure, but in such case it is not one individual, nor a dozen who suffer, but the entire community. It is a matter of history that the legislation in question was inspired by the financial disturbance in 1907, when banking institutions throughout the country were compelled to suspend payment to their depositors. Those who will recall that period will agree with me that a suspension of payment to depositors is a public calamity. So thoroughly is this plowed into the public mind, that one who would institute a run on a bank, would be regarded as a public enemy. Hence, laws calculated to safeguard the rights of depositors in banks, are not paternal in the sense that they are designed to protect individuals against their own folly, but against their acts in matters where they were practically without choice, and to protect the public at large from the far-reaching consequences of a bank failure.

As before stated, a run on a bank is properly regarded as a public calamity. It destroys confidence and paralyzes business. Bentham, in his works,⁸ says: "Police is, in general, a system of precaution, either for the prevention of crimes or calamities." The theory of banking is, that on any given day comparatively few depositors will draw out the whole or even a large part of the money standing to their credit. But in

(8) Part 9, p. 157.

times of commercial disturbances and panic the banks are in danger of sudden demands by a large number of their customers for a return of their deposits. This is what is commonly known as a "run on the bank," and subjects the bank to a strain which few, if any, can withstand, and as a rule, forces a suspension of payment, even though the assets of the bank are ample, in the ordinary course of business, to protect the depositors.

It was to safeguard the public against such calamity that the laws under consideration were enacted. They may not do so in the most effective manner, but it cannot be said truthfully that they will not, to some degree at least, inspire the public with confidence in the safety of their deposits—at least add somewhat to their assurance that they will eventually be paid—and to that extent they are calculated to avert the public disaster of a "run on the bank."

The assessments levied against the banks to meet a case of insolvency are not a tax. They are more nearly analogous to the fund raised in some states from a license on dogs for payment to the owners of sheep killed by dogs. In those states it has never been held that such license operates to take the property of a citizen for a private use, and that the statute authorizing it is unconstitutional. There the keeper of a good dog, one that he has trained not to worry or kill sheep, is compelled to contribute to pay the damage done by untrained, sheep-killing mongrels. There the legislature recognized the fact that a man had a right to keep a dog; it was doubtless aware that the majority of dogs did not kill sheep; that there were good and bad dogs. It said, the law compels no man to keep a dog, but if you do keep one, you must contribute to a fund to repair the damages done by dogs not properly kept and managed. Here the law compels no man to keep a bank. But the legislatures have said by these laws, if you do keep one, you must contribute to a fund to meet the damages caused by those which are not properly kept and managed.⁹

(9) See Cole v. Hall, 103 Ill. 30; Van Horn v. People, 46 Mich. 183.

Besides, it does not follow that a business once open to all as a common-law right, may not be transformed by the demands of the public good into a franchise. When one devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the public good.¹⁰ The business of banking includes, in its common-law signification the power to issue notes to circulate as money. The power to issue such notes, therefore, was at one time as freely exercisable by the individual as a common-law right, as that of receiving deposits, discounting paper, etc.¹¹ Yet from an early period in this country, to say nothing of England, the right to issue paper to circulate as money has generally been exercisable under a franchise.¹²

The historian, just cited, gives the following as the reasons for the transformation of that branch of the business of banking from a common-law right, to a right exercisable only under a grant from the sovereign: "The reasons of convenience which justify a prohibition of the liberty of issue are, first, that experience has shown that this process of borrowing money is too potent and too easily abused to the precipitation and aggravation of commercial crises." Might not a like reason justify a taking over of the common-law right to engage in other branches, and permitting its exercise only under a franchise from the state?

The guaranty feature of these laws is not an innovation. A similar feature was inserted in a banking law of New York in 1829, and in 1831 was included in a banking law of the state of Vermont. True, those acts were intended only to secure the circulation of the banks, but the principle involved was precisely the same, and al-

(10) Munn v. Illinois, 94 U. S. 113.

(11) See Mercantile Nat. Bank v. New York City, 121 U. S. 138-156; Exchange Bank v. Hines, 3 Ohio St. 1-31.

(12) See Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. 371; Encycl Britannica, New Am. Sup., p. 327.

though they were before the courts of those states on more than one occasion, the able lawyers of those days never questioned their constitutionality.

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COMITY—PUBLIC POLICY.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, A corporation, v. McADAMS.

Supreme Court of Wisconsin.

The rule that the law of a place of a contract governs as to its validity and interpretation, applies to the capacity, including that of married women, to contract.

The general legislative policy of this state as to relieving married women from common law disabilities to contract, and other considerations, negative the idea that full right in that regard would involve anything inherently bad and warrant our courts in refusing to enforce the foreign contract of a married woman as accommodation maker of a promissory note on grounds of public policy.

MARSHALL, J.: The appeal raises for decision this proposition: Is a married woman's contract as accommodation maker of a promissory note, which is valid in the place where made, enforceable in the courts of this state, such a contract not being valid if made here? The proposition, in the main, is governed by a few quite elementary principles.

The first principle is this: As to mere personal contracts the law thereof as to their validity and interpretation, is that of the place where they were made; the *lex loci contractus*, unless the parties thereto intended that they should be governed by the law of the place of performance; the *lex loci solutionis*, or of some other place.

Another rule is this: The law of the place of performance regulates the matter in that regard, while matters respecting remedies depend upon the law of the forum. Brown v. Gates, 120 Wis. 349.

A third rule results, logically, from those mentioned, viz: A contract which is valid in the place thereof is valid everywhere.

A fourth rule is this: The law of one state having, *ex proprio vigore*, no validity in another state, the enforcement of a foreign contract which would not be valid by the law of the forum where its enforcement is judicially attempted, depends upon comity which is extended for that purpose, unless the agreement is contrary to the public policy of the state of the forum, in that it is contrary to good morals, or the state or its citizens would be injured by the enforcement, or it perniciously violates positive written or unwritten prohibitory law; the extent to which comity will be extended being very much a matter of judicial policy to be determined within reasonable limitations by each state for itself. Finney v. Guy, 106 Wis. 256, 276; Hunt v. Well, 122 Wis. 33, 42; Fox v. Postal Telegraph Cable Co., 138 Wis. 648.

A fourth rule is this: The doctrine that the law of the place of a contract governs as to its interpretation and validity, applies to the capacity of parties, including that of married women, to bind themselves in the manner attempted. Story on Conflict of Laws, sec. 103, sec. 241; Milliken v. Pratt, 125 Mass. 374.

The last rule that need be stated, is this: A contract under the foregoing is not, necessarily, contrary to the public policy of a state, merely because it could not validly have been made there, nor is it one to which comity will not be extended, merely because the making of such contracts in the place of the forum is prohibited, general statements to the contrary notwithstanding. In Milliken v. Pratt, supra, the court remarked substantially, even a contract expressly prohibited by the statutes of the state in which the suit is brought, if not in itself immoral (the term "immoral" being used in the broadest sense), is not necessarily, nor usually deemed so invalid that the comity of the state, as admitted by its court, will refuse to entertain an action under all circumstances to enforce it. There must be something inherently bad about it, something shocking to one's sense of what is right as measured by moral standards, in the judgment of the courts, something pernicious and injurious to the public welfare.

It will occur to one, on a moment's reflection, that the last foregoing rule could not be otherwise, else the doctrine that a contract valid at the place where made is valid and, generally speaking, enforceable everywhere, would be wholly nullified as to foreign contracts which would not be valid if made in the place of enforcement is sought. The rule would be useless, since in every case of such a contract it would never be enforceable except in the place where made.

Many illustrations might be given of instances of contracts made elsewhere, which would not have been valid if made here in the state where judicial enforcement was attempted, including instances where the invalidity was referable to statutory prohibitions, being afforded by judicial remedies in the latter jurisdiction. Such are contracts providing for a rate of interest which would be usurious with penalizing consequences, even to the extent of forfeiture of principal and interest as to such a contract, if made in the law of the forum. *Fisher v. Otis*, 3 Pin. 78; *Richards v. Globe Bank*, 12 Wis. 692; *Newman v. Kershaw*, 10 Wis. 333; *Vliet v. Camp*, 13 Wis. 198; *Lyon v. Ewing*, 17 Wis. 61; *Maynard v. Hall*, 92 Wis. 565; *Miller v. Tiffany*, 1 Wall. 298, 310. Also, a contract allowable by the statute of frauds where made, held enforceable in another country where such a contract would be void by the written law. *Scudder v. Union Nat. Bank*, 91 U. S. 406. The same is true of Sunday contracts. *Brown v. Gates*, 120 Wis. 340; *Hammon on Contracts*, 260, and cases cited. The illustrations could be extended to many subjects, and contracts which would, if made here, not be enforceable because extinguished by the statute of limitation of our state.

From the foregoing it will be readily appreciated how a conflict between the judicial holdings of different countries might, as it has, create confusion respecting the proposition under consideration. There is opportunity for courts to be, as they seemingly have been in some instances, misled by looking only to the rule that a contract valid where made, which if made in the place of the forum would be contrary to law, and so not enforceable, is likewise remediless, not regarding that the rule is a mere exception, and quite a narrow one at that, to the broader rule covering contracts in general, but still greater opportunity for courts to take conflicting position by reason of each being, to a very large extent, supreme in its own jurisdiction as to what elements render a contract inherently harmful, and so to what extent, by rules of

comity, the foreign law should be given effect.

The opportunities for conflict referred to have operated efficiently as to the proposition under discussion, as illustrated by cases holding that, in the circumstances here, the married woman's contract cannot be enforced (*Armstrong v. Best*, 112 N. C. 59; *Thompson v. Taylor*, 65 N. J. L. 107; *Hayden v. Stone*, 13 R. I. 106), while the great weight of authority is to the contrary upon the ground that such a contract is not against the policy of the law in the sense that the term is used in testing whether the foreign law of a contract as to its validity can be enforced. On this very many citations might be given. The following are but a very few of them: *Milliken v. Pratt*, 125 Mass. 374; *Ross v. Ross*, 129 Mass. 243, 246; *Corrigue v. Keller*, 164 Ind. 676; *Baer Bros. v. Terry*, 108 La. 597; *Young v. Hart*, 101 Va. 480; *Baum v. Birchall*, 150 Pa. St. 164; *Gibson v. Sublett*, 82 Ky. 596; *Robinson v. Queen*, 87 Tenn. 445; *Bell v. Packard*, 69 Me. 105.

The industry of counsel resulted in bringing to our attention three judicial authorities to support the negative of the proposition under consideration, which seems to be sufficiently in point to warrant noticing them. Counsel cite other cases, *First Nat. Bank v. Shaw*, 109 Tenn. 237; *Rhue v. Buck*, 124 Mo. 178; *Dulin v. McCaw*, 39 W. Va. 721; *Bank of Louisiana v. Williams*, 46 Miss. 618; *Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, and the like. These cases either in principle support *Milliken v. Pratt*, *supra*, and the numerous cases we have cited, or go upon the ground that in the particular instance merely the manner of enforcement of the contract was involved, which is governed by the law of the forum, or the contract, though made in the foreign state, related to real property in the state of the forum, was not a mere personal contract enforceable in personam, but one enforceable in rem and by an action in the nature of one in rem.

The three cases cited by counsel to which we accord some significance, after careful research we are unable to add to, from other jurisdictions, though there may be some. Such few are entitled to very little weight.

Armstrong v. Best, 112 N. C. 59, went upon the obviously erroneous theory that, the law of the forum, as to the capacity of parties to contract, governs. That was stated without citation of authority, and it seems none of moment could have been cited. In a later case, *Hanover Nat. Bank v. Howell*, 118 N. C. 271, the court made an effort to place its doctrine on a more logical ground. After all the court seems to have doubted the soundness of its

position and rather invited legislative assistance for the purpose of avoiding it.

In *Hayden v. Stone*, 13 R. I. 106, the court approved the general principle that the validity of a contract is referable to the law of the place where made, but leaned to the idea that it does not extend to the capacity to contract, and concluded in any event that the question in the particular instance really considered the remedy, and, as there was none afforded in that state to its own citizens to enforce a married woman's mere promissory note, none could be afforded to a citizen of another state. The infirmity of the logic, when tested by elementary principles, is apparent at once, except so far as it was competent for the Rhode Island court, in the absence of any restraint in the written law, to establish the doctrine announced as the public policy of that state, if it saw fit.

In *Brown v. Browning*, 15 R. I. 442, the court seems to have endeavored to very much limit its former decision, suggesting, in effect, that it did not go upon the validity of the contract, which was governed by the Massachusetts law where it was made, but to the particular remedy by attachment sought to be used.

Thompson v. Taylor, 65 N. J. L. 107, dealt with a married woman's agreement to be bound as an accommodation maker, as in this case, in face of an express prohibitory statute forbidding such agreements. The court recognized the general rule declared in the leading case of *Milliken v. Pratt*, *supra*, but concluded that the legislature having condemned such contracts as harmful, that established a public policy for the state precluding its courts from being used on grounds of comity to enforce such a contract, regardless of its being valid by the foreign law.

Nearly all the common law disabilities of women to contract have been removed. They can acquire and enjoy property and make all contracts necessary or convenient in that regard. They can, in equity, charge their property substantially at will. There is little left of a business nature which men can do that they cannot do. They have nearly all the rights of men, and some besides, and on all sides are making pressing claims with distinguished support for what is yet withheld, not very firmly nor perhaps very logically. How can the ordinary business contract in question, so common among men of ordinary perceptions, be said to be contrary to any policy of this state heretofore, or which should not be, adjudged bad in the interest of good morals? We can give no answer to that consistent with respondent's petition. It is considered there is none, and that the proposition under consid-

eration must be answered in the affirmative. The decision appealed from is erroneous. The contract of respondent must be held as valid and enforceable here as in the place where it was made.

BY THE COURT: The judgment in respondent's favor is reversed, and the cause remanded, with directions to amend the judgment against the co-defendant so as to be against him and respondent as well.

Note.—Disability of Coverture by the lex domicilii and the lex loci contractus with Reference to Comity.—The principal case associates comity, as do many others, with this class of cases, and we instance several, as was done in an annotation in 51 Cent. L. J. 111, where the subject is elaborately treated.

In *Young v. Hart*, 101 Va. 480, 44 S. E. 703, the Virginia Court of Appeals says: "It seems to be well settled that a contract of a married woman, valid where made and to be performed, is valid everywhere, unless she be domiciled in a state where the law of the domicile imposes a total incapacity to contract on the part of its married women. Where the common law prevails in full force by which a married woman is deemed incapable of binding herself by any contract whatever, it has been held in some cases, and suggested in others, that this utter want of capacity must be considered as so fixed by the settled policy of the state that its courts could not yield to the law of another state in which she might undertake to contract."

To this are cited *Armstrong v. Best*, and *Milliken v. Pratt*, *supra*.

The *Milliken* case is regarded as one of the leading cases on this subject. This case goes into considerable review of the authorities upon the question of capacity to contract being governed by the *lex domicilii* or the *lex loci contractus*. The opinion states that the principal reasons which determined continental jurists in favor of the former was the rightful power of the state to regulate the status and condition of its subjects, for being best acquainted with circumstances of climate, race, character, manners and customs, it can best judge at what age young persons may begin to act for themselves and whether and how far married women may act independently of their husbands. Against this the opinion speaks of comity allowing laws to operate extraterritorially and of its being, in the great majority of cases, especially in this country, where it is so common to travel or to transact business through agents, or to correspond by letter from one state to another, more just as well as more convenient, to have regard to the place of contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties may be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. The opinion considered the latter the more proper view, and as we take it, the *argumentum ob inconvenienti*, though

impliedly admitting that the state of domicile has the power claimed by the continental jurists to deny personal capacity to a particular class of subjects, should forcibly appeal to a comity jurisdiction in favor of another than the state of domicile, though this other abrogates the law of a domicile.

Then the opinion decides that the comity jurisdiction, if it has discarded the absolute incapacity theory, may enforce an extension in contractual capacity beyond what its own law provides for.

In the Armstrong case, which, as it appears to us, the principal case might have referred to somewhat more fully, the Milliken case is regarded as pushing the theory of *lex loci contractus* to the extreme limit, and yet admits that where the incapacity of a married woman is the settled policy of the state "for the protection of its own citizens, it could not be held by the courts of that state to yield to the law of another state in which she might undertake to contract." This case then goes on to show, that the policy of the forum is regarded more than the policy of the domicile—if incapacity exists at the forum that is the test. We purpose attempting to show that this application of policy at all is misplaced—possibly not by authority, but there is logic in the situation which the courts have overlooked. In North Carolina the *lex loci contractus* was refused enforcement because "the common law disability of a *feme covert* still obtains." The pushing to a limit in the Milliken case as viewed by the North Carolina court, appears to be in Massachusetts' statute awarding enforcement because the common law disability had been only partially abrogated.

In Frierson v. Williams, 57 Miss. 451, the opinion by Judge (afterwards Senator) George, whose reputation as a judge needs not to be told, it is said: "It is generally true that the capacity of a married woman to contract will be determined by the law of her domicile." This being taken as a basis, and it appearing that the laws of Louisiana and Mississippi were in accord that she is incapacitated from making a contract of suretyship, and that they differed with respect to her ability to charge her separate estate, Louisiana not permitting her to do this, and Mississippi allowing this, the *lex rei sitae* was applied. It was said: "There is no real conflict between the laws of Louisiana and Mississippi in reference to the contract. By both laws the note is void for what it purports to be on its face—a personal obligation of the wife; and it is void for the same reason in both, viz.: the personal incapacity of the wife. If the note had not been void by our laws, as the personal obligation of the wife, we should nevertheless, out of comity to a sister state, adjudge it void to that extent, if attempted to be enforced here; but the principle of comity does not require a state to regard the laws of any other state, so far as they may affect real estate situated in the former state." The note considered was executed at the domicile, and that being the place of contract, there was no reason to distinguish between the *lex domicilii* and *lex loci contractus* and therefore it might be urged this is not strong authority.

In Dulin v. McCaw, 39 W. Va. 721, 20 S. E. 681, the court speaks of the *lex loci contractus* governing in a married woman's case being strengthened by the fact that it was also the law

of her domicile. This observation helps to lead on to what we will presently remark upon. Baum v. Birchall, 150 Pa. 164, is an authority going beyond the mere principle, that incapacity of domicile does not accompany her to the place of contract, if elsewhere, where the place of making is also the place of performance of, a contract, but a married woman can in her own domicile rid herself of incapacity by making performance elsewhere.

To our mind, there is no question of comity involved in these coverture matters at all, or in others where disability to contract is claimed. If the *lex domicilii* and the *lex loci contractus* concur to vest a right in one against another, that though a *chance in action* is a right in property and there is no question of a foreign law having extraterritorial operation. It has already operated intraterritorially by creating the right. If these two laws concur to pronounce a pretended claim of right absolutely invalid, how can one raise a void claim of right into a valid subsisting right by the locomotion of either party to a pretended transaction? Of course, there may arise a question in a comity jurisdiction that goes to the consideration being of an immoral or illegal nature, making its enforcement the lending of judicial remedies contrary to public policy. And the *lex rei sitae* may govern. But these two matters apply no more strongly to coverture disabilities than other contractual relations. If one, therefore, has in any competent place acquired a right by contract against a married woman, because she by the law of that place stands like a *feme sole*, she should be deemed a *feme sole everywhere*. If the law of that place says she is not a *feme sole* there, how can she be anywhere? No right of action there beginning, where else could it begin? Can a comity jurisdiction create a right?

But which law governs when there is divergence in respect to the ordinary place of contract? The Milliken case does not deny that it is valid legislation to impose disabilities upon the subjects of a state. And we think it may be said it can impose them on no one else. But if this is true, how can the *lex loci contractus* impose a disability unless it is also the *lex domicilii*? These cases on comity speak about the extraterritorial operation of laws, not being recognized, and then proceed to bind those not subjects of another state. Take the Baum-Birchall case and we perceive how one may procure a wife, remaining at her own domicile, to avoid her disability by signing a note and making it payable in another state.

But, it seems to us, that the Milliken case, relying as it does on nothing but confusion and inconvenience making necessary recognition of the *lex loci contractus* instead of *lex domicilii*, approaches very nearly to stating itself out of court, and we doubt whether by this course, confusion would be greatly allayed. Judge-made law rarely runs to assist harmonious administration, because one cannot put his finger on it with the same certainty that he does upon a statute. The federal courts in this kind of a question are too much tinctured with a federal virus to entitle them to be considered on the same plane with state cases. We get tired of hearing their judges talk about state duty and state policy, while they continue to claim independence in the interpretation of state law.

C.

JETSAM AND FLOTSAM.

JUDGES LECTURING JURORS BECAUSE OF THEIR VERDICT.

We learn from an esteemed contemporary (*New York Law Journal*, Vol. XLII., page 2080), that a bill has been introduced in the New York Legislature as follows "Sec. 1793. Criticism of jury and jurors by presiding judges. The judge or justice presiding at the trial of a civil or criminal action in any court, shall not, in open court, make any adverse criticism of the jury or its members on account of the verdict in such action. Any judge or justice violating the provisions of this section is guilty of a misdemeanor." We have heard of some objurgations by judges that made them look like common scolds, and others which implied strongly corruption, and we greatly doubt whether we have thought there was any timeliness in either, if it might be conceded that the panel personally deserved what they got. It is one of the rarest things in the world, however, to find twelve competent men trying one case. They may be moved unconsciously to injustice, and may find a verdict from passion or prejudice, but to castigate from the bench a lot of free American citizens, in a respectable community, proves most generally that one who would do it is himself so intemperate and indomitable that an antidote ought to be considered as accompanying the scandal thus set afloat.

WESTERN FEDERAL JUDGES UNDER FIRE.

Last week we referred to the fact that for more than a year certain prominent federal judges have been under fire.

We stated then that we had not been nor were yet inclined to believe the charges in their entirety, but called upon the judges thus attacked to clear themselves and their high and important offices from the stigma cast upon them.

The most serious of these charges have been made against Judge Peter S. Grosscup of Chicago. We do not think best to repeat them. Nor do we know whether any of them would be proven or not. We are willing to give the judge the benefit of the doubt.

But we can no longer conceal the fact that many of the people, and not a few lawyers, have begun to express a lack of confidence in Judge Grosscup because of these charges.

The condition in Chicago is deplorable if newspaper reports are to be believed. There gross attacks have been made upon this particular judge in great public gatherings and in the press.

As we stated last week, we do not care to peddle these charges, but are rather inclined

to resent them in the manner they are made and call upon the judge's detractors to carry their evidence to Washington and substantiate them, or keep silent.

However, we cannot blind ourselves to the great loss of prestige that is resulting to the federal judiciary from these attacks, and in the interest of judicial integrity and confidence we must call upon Judge Grosscup, in the name of the profession, to silence the detractors and clear the fair name and honor of the great office he fills.

Judge Grosscup is a lawyer of considerable legal ability, and we greatly regret this serious attack upon him, but if he has been guilty of any indiscretions which have given any cause for such attacks, he should admit them and step down from his office in obedience to the demand of an outraged public opinion. If he has not been guilty of the charges against him, and we are quite ready to believe him to be guiltless, there is an open way for him to silence the charges forever.

Unless something is done to curb the growing popular antipathy to the federal judiciary, which is fanned into flames by such charges as are being made at the present time, the people will soon demand the abolition of the life tenure of office for the lower federal judiciary. And we are beginning to believe it would be the part of wisdom for Congress to propose some such innovation at the earliest opportunity in the interest of justice and to revive public confidence in the nation's judiciary.

In the meantime we still believe it to be the duty of the bar to uphold the integrity of the bench whose occupants are being thus attacked, and to promote by all means possible the people's confidence in the courts.

BOOK REVIEWS.

MANUAL OF MEDICAL JURISPRUDENCE. 2d Ed.

Prof. Marshall D. Ewell, lecturer on medical jurisprudence at University of Michigan, presents a second edition of the above work, more than twenty years after the appearance of the first.

This is not a very large book, being octavo size and containing but 400 pages. But it has always been recognized as a meritorious publication, presenting in moderate compass leading facts and principles in the science of medicine, concisely stated and readily usable by a trial lawyer. There is little citation of legal authority to the text propositions, but condensation of such as is attempted is closely adhered to.

The author states that such changes have been made in the second edition as to make it "conform to the present state of the science."

The book is in cloth with net price of \$2.50, and published by Little, Brown & Co., Boston, 1909.

FREE PRESS ANTHOLOGY.

This volume contains some excellent matter, especially what it compiled about Free Press. Other things the author includes in regard to "Censorship of Obscenity," "Free Sex Discussion," "Liberty of Speech for Anarchists," would have improved his performance in producing a book by their absence. People write prurient things because they are approved by the prurient minded. Conversation designed to elevate thought is like a painting suggestive of purity. A ribald license in the exposure by tongue or pen of what suggests impure reflections is like portrayal by statuary or painting of indecency. All present a picture to the mind. Purity needs not to be offended by impurity. If books or billboards abound which flaunt impurity, they come under police power as much as nauseous odors, in their detraction from public health and comfort. A moral stench is as unhealthful to the body politic as a physical stench.

Nevertheless the contribution selected from the writings of Milton, Locke, John Stuart Mill, Bentham and other such, who, we believe, would as earnestly as other pure-minded people, deride the claim that obscenity and anarchy in speech, should claim protection in a free speech, are a most excellent collection. This book seems to us to prove there are extremists among the so-called liberals, as well as those in censorship, but the common sense of the world knows that anarchists ought not to be allowed to foment the overturning of government while enjoying its protection, and that assaults on purity are, in their final analysis, assaults on government.

This book is in paper cover, showing compilation by Theodore Schroeder, and published by The Free Speech League, 120 Lexington avenue, and The Truth Seeker Pub. Co., 62 Vesey street, both of New York City, 1909.

BOOKS RECEIVED.

Law Classics Library. Six volumes. Vol. I., Grotius—The Rights of War and Peace. Vol. II. Plato—The Republic. The Statesman. Vol. III. Sir George Cornewall Lewis—The Government of Dependencies. Adam Smith—An Essay on Colonies. Vols. IV and V. Hamilton, Jay, Madison—The Federalist. Walter Bagehot—The English Constitution. Vol. VI. Sir Thomas More, Lord Bacon, Campanella, Rousseau—Ideal Empires and Republics. Price \$30.00 per set. Central Law Journal Company, Selling Agents. Review will follow.

The American State Reports, containing the cases of general value and authority subsequent to those contained in the "American Decisions," and the "American Reports," decided in the Courts of Last Resort of the several states. Selected, reported and annotated by A. C. Freeman, Vol. 129, San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers, 1910. Review will follow.

Theory and Practice of Estate Accounting. For accountants, lawyers, executors, administrators and trustees. By Frederick H. Baugh, expert accountant, and William C. Schmeisser, A. B., LL. D., of the Baltimore bar. Baltimore: M. Curlander, Law Bookseller and Importer, 1910. Price \$4.00. Review will follow.

HUMOR OF THE LAW.

"If I can free this case from technicalities and get it properly swung to the jury, I'll win," Abraham Lincoln used to say, when confident of the justice of the cause he represented. He was weak in defending a wrong case, for he was mentally and morally too honest to explain away the bad point of a cause by ingenious sophistry.

Instead of attempting to bolster up such a cause, he abandoned it. Once he abandoned a case in open court, being convinced that it was unjust. A less fastidious lawyer took Mr. Lincoln's place and won the case.

Mr. Herndon, in his "Life of Lincoln," tells a story which exhibits his ability in getting a case he believed in "properly swung to the jury."

A pension agent, named Wright, secured for the widow of a Revolutionary soldier a pension of four hundred dollars of which sum he retained one-half as his fee. The pensioner, a crippled old woman, hobbled into Lincoln's office and told her story. It stirred Lincoln up; he brought suit against the agent, and on the day of the trial he said:

"I am going to skin Wright and get that money back."

He did so. The old woman told her story to the jury. Lincoln, in his plea, drew a picture of the hardships of Valley Forge, describing the soldiers as creeping barefooted over the ice, and marking their tracks by their bleeding feet. Then he contrasted the hardships of the soldiers endured for their country with the hardened action of the agent in fleecing the old woman of one-half of her pension.

He was merciless; the members of the jury were in tears, and the agent writhed in his seat under the castigation of Lincoln's denunciation. The jury returned a verdict in her favor for the full amount, and Lincoln made no charge for her services.

His notes for the argument were unique:
"No contract.—Not professional services.—Unreasonable charge.—Money retained by Deft not given by Pl'tf.—Revolutionary War.—Describe Valley Forge privations.—Ice.—Soldiers' bleeding feet.—Pl'tf's husband.—Soldier leaving for army.—Skin Deft.—Close."

In these days, when trial by newspaper is fast taking the place of trial by jury, it is encouraging to meet with any evidence that the editorial mind takes a large and judicial view of social questions. Here, for instance, is a Missouri journal which lays down a broad principle, the equity of which few will be found to dispute:

"If you are a married man," this editor declares, "your wife can compel you to support her. If you are not, she can't."

The former conclusion may be good law, although the enforcement of which is sometimes attended with great practical difficulties.

As to the second relation our observation forces a contrary conclusion. It costs more and besides it don't require action by the courts to effect maintenance.—Ohio Law Bulletin.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. Adjoining Landowners—Lateral Support.—Adjoining landowner in making excavation held not liable for injuries in the absence of negligence where lateral pressure is increased by buildings.—*Barnes v. City of Waterbury, Conn.*, 74 Atl. 902.

2. Adverse Possession—Color of Title.—Though a tax judgment was voidable, it was admissible in evidence in behalf of purchasers at a sale thereunder in support of the three-year statute of limitation.—*Carr v. Miller, Tex.*, 123 S. W. 1158.

3. Partition.—A partition is merely declamatory and not translatable of ownership and cannot serve as a basis for prescription.—*Pearce v. Ford, La.*, 50 So. 771.

4. Animals—Killing With Intent to Steal.—The offense denounced by Acts 1870, Ex. Sess., p. 50, No. 8, sec. 3, is the killing of an animal with intent to steal, and is distinct from the crime of larceny.—*State v. Brown, La.*, 50 So. 813.

5. Attorney and Client—Bail or Surety.—Acts 1880, p. 18, No. 11, held not to prohibit an attorney from becoming surety on his client's bail bond.—*State v. Babin, La.*, 50 So. 825.

6. Effect of Suspension of Attorney.—A suspended attorney had no authority to move to set aside a judgment and open a default taken after his suspension, where his only interest in the case was his lien.—*McDonald v. Kane*, 120 N. Y. Supp. 283.

7. Appeal and Error—Proceedings for Land Registration.—Writ of error and not appeal is the proper proceeding for review in the Supreme Court of a judgment of the Supreme Court of the Philippine Islands, affirming a

judgment of the court of land registration.—*Tiglao v. Insular Government of Philippine Islands, U. S. S. C.*, 30 Sup. Ct. 129.

8. Appearance—Objection to Jurisdiction.—One whose rights are affected by a proceeding is not required to test the validity of orders in the proceedings by disobedience, but may appear specially and test the question of the validity of the proceedings with a view to having them dismissed, if invalid.—*Warlick v. H. P. Reynolds & Co., N. C.*, 66 S. E. 657.

9. Attorney and Client—Authority.—An attorney at law, under his general authority, cannot make a valid acceptance of service of original process.—*Warlick v. H. P. Reynolds & Co., N. C.*, 66 S. E. 657.

10. Banks and Banking—Notice to Director.—Notice to director of matter which it is to his interest to conceal held not notice to the bank.—*First Nat. Bank v. Lowther-Kaufman Oil & Coal Co., W. Va.*, 66 S. E. 713.

11. Payment on Forged Check.—That the year was not filled out on a forged check held not sufficient to put the bank on inquiry so as to make it liable for its payment.—*Israel v. State Nat. Bank of New Orleans, La.*, 50 So. 783.

12. Bills and Notes—Consideration.—Even though one appeared to have signed a promissory note as an accommodation indorser, there was sufficient consideration for his indorsement if the note would not have been accepted without it.—*Uvalde Asphalt Paving Co. v. National Trading Co.*, 120 N. Y. Supp. 11.

13. Title.—Where a note is made payable to R., "executor of" a named estate, both the legal and equitable title thereto are *prima facie* in R. individually.—*Kennedy v. Gelders, Ga.*, 66 S. E. 620.

14. Brokers—Commissions.—Where a real estate broker acted for the purchaser he could not, in the absence of a disclosure of that fact to the owner, look to the owner for commissions.—*Summa v. Dereskiawicz, Conn.*, 74 Atl. 906.

15. Discharge.—Where a broker, engaged to sell a stock of goods, effected a contract of sale between the owner and another, rescission of this contract by the parties held not a discharge of the broker.—*Shelton v. Lundin, Ind.*, 90 N. E. 387.

16. Carriers—Ejecting Passengers.—In an action for ejection of a passenger on an excursion, evidence that defendant's conductor announced that no drinking would be allowed on the return trip held admissible.—*Magill v. Seaboard Air Line Ry., S. C.*, 66 S. E. 561.

17. Prima Facie Negligence.—If, in a suit against connecting carriers, delivery of stock in a sound condition to the initial carrier is shown, and it appears that they were injured when delivered to consignee, it establishes a *prima facie* case of negligence.—*St. Louis & F. R. Co. v. Franklin, Tex.*, 123 S. W. 1150.

18. Champerty and Maintenance—Champertous Transactions.—A contract authorizing plaintiff to institute suit to recover land held not champertous, though a cost bond in the action was voluntarily executed by plaintiff's counsel.—*Shelton v. Franklin, Mo.*, 123 S. W. 1084.

19. Charities—Negligence of Servant.—Where plaintiff, a steam fitter's helper, was injured by the negligence of defendant's servant while working on premises occupied by defendant, pursuant to a contract with plaintiff's employ-

er, defendant was liable under the doctrine of respondeat superior even if it was a charitable institution.—*Gartland v. New York Zoological Society*, 120 N. Y. Supp. 24.

20. Constitutional Law—Due Process of Law.—Rev. Laws, c. 12, secs. 4, 23, providing for the taxation of shares of capital stock of a resident of the state in a foreign corporation, is not violation of section 1 of the fourteenth amendment of the federal constitution.—*Hawley v. City of Malden, Mass.*, 90 N. E. 415.

21. Impairing Contract Obligations.—The obligation of a contract under which stockholders in a Kansas corporation acquired their stock held not impaired by Laws Kan. 1898 (Sp. Sess.) p. 32, c. 10, sec. 12, requiring that a statement of transfer of stock shall be filed with the Secretary of State by the officers of the corporation.—*Henley v. Myers*, U. S. S. C., 30 Sup. Ct. 143.

22. Contracts—Consideration.—A stockholders' independent promise to pay a debt of the corporation held enforceable only when based on an independent consideration.—*Yracheta v. Stanford*, 120 N. Y. Supp. 117.

23. Corporations—Service on Foreign Corporation.—A foreign corporation can be served with process within a state only when it is doing business therein, and such service must be made on an agent representing the company and its business.—*Mechanical Appliance Co. v. Castleman*, U. S. S. C., 30 Sup. Ct. 125.

24. Counties—Official Duties.—Where the law imposes on an officer the performance of acts as a part of his official duties, the commissioners' court of the county is without authority to contract with any other person to perform such services.—*Stringer v. Franklin County, Tex.*, 123 S. W. 1168.

25. Validity of Contracts.—The rule that a corporation receiving the benefit of an executed contract is estopped from pleading that the contract was ultra vires held not to apply to counties, towns, or cities where they exceed the legislative limit in contracting debts.—*Burgin v. Smith, N. C.*, 66 S. E. 607.

26. Courts—Alias Summons.—After the last day on which service of the original summons may be had, the value of the original summons held only to prove that the alias was issued within the required time.—*Godfrey v. Errett*, 120 N. Y. Supp. 57.

27. Criminal Law—Confessions.—A confession may be in the form of a letter, or of several letters to different persons, or may consist of detached conversations with many people, or it may be a formal confession, or of all together.—*People v. Giro*, N. Y., 90 N. E. 432.

28. Failure to Examine Witness.—Statement by prosecuting attorney in his argument that the reason he had not called a certain witness subpoenaed for the prosecution was because he was going to lie is not ground for reversal.—*State v. Brady*, La., 50 So. 806.

29. Criminal Trial—Appeal by Government.—The decision of federal court sustaining demurmer to indictment for introducing liquor into Indian country is reviewable by writ of error, where the question whether the indictment charges any offense against the United States involves the validity of Act January 30, 1897, c. 109, 29 Stat. 506.—*United States v. Sutton*, U. S. S. C., 30 Sup. Ct. 116.

30. Misconduct of Jury.—Basing a conviction for perjury on the convictions of defendant on the prosecution on which he gave the alleged false testimony held misconduct of the jury, requiring reversal.—*Warren v. State*, Tex., 123 S. W. 1115.

31. Deeds—Description of Property.—A deed purporting to convey "324 acres of land, part of a certain tract" described by metes and bounds which contain 724 acres, without stating what part of the tract is sought to be conveyed, or any facts by which it can be identified, is void.—*Cathay v. Buchanan Lumber Co.*, N. C., 66 S. E. 530.

32. Descent and Distribution—Claims Against Distributee.—The right to retain from a distributee's share the amount of his indebtedness to the estate is not affected by the fact that the indebtedness is barred by limitations, so

long as the indebtedness has not been discharged.—*Ex parte Wilson*, S. C., 66 S. E. 675.

33. Domicile—Establishment.—To establish a domicile of choice, there must be an abandonment of domicile of origin, selection of a new locus, and an intent of remaining.—*Mather v. Cunningham*, Me., 74 Atl. 809.

34. Eminent Domain—Property Subject to Compensation.—The special rights of owners of land extending to ordinary high-water mark of navigable waters in the waters opposite their holdings are rights of property which may not be taken without compensation and due process of law.—*Broward v. Mabry*, Fla., 50 So. 826.

35. Value of Land Taken.—Where land sought to be condemned for public use is of greater value considered as a part of the entire property than as a separate piece, the compensation to be paid is the fair cash or market value considered in its relation to the remainder.—*West Skokie Drainage Dist. v. Dawson*, Ill., 90 N. E. 377.

36. Equity—Pleading.—Objection of multifariousness will not prevail on appeal where the bill charges a conspiracy between several trespassers, and trespasses extending over contiguous lands treated as one.—*Graves v. Ashburn*, U. S. S. C., 30 Sup. Ct. 108.

37. Executors and Administrators—Chinese Domicile.—A Chinese domicile gives a decedent's estate a fixed place of abode, and subjects it to the law governing the locality.—*Mather v. Cunningham*, Me., 74 Atl. 809.

38. Creditor's Right to Sue.—A creditor of a decedent held entitled to sue the administrator, widow, and heirs for discovery of assets, and to subject land conveyed by the decedent in his lifetime, in consideration of love and affection.—*Shurtliff v. Right*, W. Va., 66 S. E. 719.

39. Fraudulent Conveyances.—Judgment creditors of a deceased debtor have a right of action to annul any contract made by him in fraud of their rights.—*Bank of Berwick v. George Vinson Shingle & Mfg. Co., Limited*, La., 50 So. 823.

40. Exemptions—Property Subject.—That the judgment creditor had a privilege on property sought to be seized under execution, because the judgment was for necessary supplies, would not entitle the creditor to fees upon execution property of the debtor which was exempt therefrom.—*Hinton v. Roane*, La., 50 So. 798.

41. False Imprisonment—Sufficiency of Order for Arrest.—A direction given by a pastor during a disturbance in church for the arrest of a disturber held not to have authorized his arrest at a later time, so as to render the pastor liable for false imprisonment.—*Stevens v. Gilbert*, 120 N. Y. Supp. 114.

42. Federal Court—Following State Decisions.—Decision of the highest state court that grants or in a deed conveying coal under a tract of land with a right to mine the same cannot maintain action for damages on failure of the grantee to support the surface land, held not binding on the federal courts.—*Kuhn v. Fairmont Coal Co.*, U. S. S. C., 30 Sup. Ct. 140.

43. Service of Process.—Affidavits filed in connection with plea to jurisdiction should be considered by a federal Circuit Court in deciding the question raised by the plea setting up the corporation and that the person served with process was not its agent at the time.—*Mechanical Appliance Co. v. Castleman*, U. S. S. C., 30 Sup. Ct. 125.

44. Fixtures—Sugar Mill.—A sugar mill erected on land held to pass with a deed to the land as a fixture.—*Lanier v. Winchester*, Ga., 66 S. E. 626.

45. Fire Insurance—Waiver of Forfeiture.—Parol waiver as to forfeiture clauses in insurance contracts may be shown notwithstanding an express provision of the policy forbidding it.—*British America Assur. Co. v. Francisco*, Tex., 123 S. W. 1144.

46. Frauds, Statute of—Executed Contract.—A tort-feasor when sued for an injury to land cannot object that a contract for sale of the land to plaintiff which had been executed was unenforceable in equity for noncompliance with the statute of frauds.—*Virginia Ry. Co. v. Jeffries' Adm'r*, Va., 66 S. E. 731.

47.—Part Performance.—Improvements indicating part performance of a land contract must be substantial and permanent, and the loss thereof a sacrifice, and must warrant a belief that they would not have been made, had there been no contract.—*McKinley v. Hessen*, 120 N. Y. Supp. 257.

48. Fraudulent Conveyances—Consideration.—A deed, in consideration of future support of a grantor, held void as against existing creditors.—*Shurtleff v. Right*, W. Va., 66 S. E. 719.

49.—Existing Obligations.—The liability of a principal to indemnify a surety on a bond is an existing liability when the bond is executed within the rule that a conveyance with intent to defraud creditors is void as to existing obligations.—*Graeber v. Sides*, N. C., 66 S. E. 600.

50.—Injunction.—The cutting, pendente lite, by the grantee in a fraudulent deed, of timber, valuable for timber and turpentine purposes, held not to defeat the jurisdiction of equity to cancel the deed.—*Graves v. Ashburn*, U. S. S. C., 30 Sup. Ct. 108.

51.—Mortgages.—A mortgage given to secure an actual loan may be fraudulent as to the creditors, if made with intent to screen the property of the insolvent debtor from the creditors.—*Bank of Berwick v. George Vinson Shingle & Mfg. Co.*, Limited, La., 50 So. 823.

52. Homicide—Assault With Intent to Murder.—To sustain a charge of assault with intent to murder, the evidence must show that, if death had ensued, it would have been murder.—*Williams v. State*, Tex., 123 S. W. 1110.

53.—Evidence.—Where defendant, in a prosecution for homicide, offers his clothes in evidence as part of his defense, the court is under no duty, at his request, to then order a chemical examination of the clothes for blood stains; there being no claim by the state that they did contain blood stains.—*State v. Barker*, Wash., 106 Pac. 133.

54.—Instructions.—An instruction that, if the jury were "left in doubt" as to whether accused slew in self-defense, they should convict of manslaughter, was erroneous.—*State v. Fowler*, N. C., 66 S. E. 567.

55.—Verdict.—That the jury found the accused guilty of murder "without capital punishment" was not evidence of such uncertainty in the minds of the jury as to justify a reversal.—*State v. Brady*, La., 50 So. 806.

56. Indictment and Information—Bill of Particulars.—In a prosecution for maintaining a tippling shop, defendant held entitled to a bill of particulars alleging the name of the particular drink sold by him claimed by the state to be intoxicating.—*State v. Clark*, La., 50 So. 811.

57. Intoxicating Liquors—Formula.—A beverage under a particular trade-name and manufactured by a particular firm would be presumed to be manufactured from a formula, and to be of a uniform quality.—*State v. Clark*, La., 50 So. 811.

58.—"Near Beer."—Since the General Assembly, by the "near-beer" tax act, has expressed the general policy of permitting its sale, the counties may not prohibit it, and municipalities may only regulate, but not forbid, its sale.—*Parker v. Griffith*, N. C., 66 S. E. 565.

59. Joint Adventures—Fraud.—Where the officers and managers of a syndicate, wishing to unite the interests of separate corporations, organized a holding corporation and issued a prospectus in relation thereto, the officers and managers who adopted and recognized the prospectus are liable for any fraud or misrepresentation contained therein, though innocent of any personal wrongdoing.—*Lane v. Fenn*, 120 N. Y. Supp. 237.

60. Judicial Sales—Policy of the Law.—The policy of the law is to remove before sale all defects of title to property sold under judicial process, so as to have the property sold bring the highest price and eliminate, as far as possible, speculation in defective titles to such property.—*Crockett v. Bray*, N. C., 66 S. E. 666.

61. Landlord and Tenant—Creation of Relation.—A contract granting room on a dock held to create the relation of landlord and tenant.—*Brooklyn Dock & Terminal Co. v. Bahrenburg*, 120 N. Y. Supp. 205.

62.—Creation of Relation.—A contract for the right to place signs on the buildings of another does not create the relation of landlord and tenant.—*May v. Breunig*, 120 N. Y. Supp. 98.

63.—Effect of Foreclosure of Mortgage.—A tenant, who was not a party to a foreclosure, is not bound by the proceedings; and, not having attorned to a receiver appointed therein, he cannot be divested of his possession by summary proceedings by such receiver.—*McDonald v. Cohen*, 120 N. Y. Supp. 94.

64. Libel and Slander—Report of Judicial Proceedings.—A report of a judicial proceeding held not as a matter of law a fair report, but the question of malice resulting from failure to include in the report certain matter is for the jury.—*Meriwether v. Publishers*: Geo. Knapp & Co., Mo., 123 S. W. 1100.

65. Logs and Logging—Delivery.—In an action for the price of logs furnished under a contract to deliver at I., about 500 oak and poplar logs, plaintiff could not recover unless he delivered at or near I. the logs specified in the contract.—*Eversole v. Wilson*, Ky., 123 S. W. 1196.

66. Malicious Prosecution—Statement to Prosecuting Officer.—In an action for malicious prosecution, where defendant, after statement of the case, made his affidavit under instruction of the prosecuting attorney, there can be no recovery.—*Hammar v. J. B. & J. W. Atkins*, La., 50 So. 787.

67. Mandamus—Demand.—A demand held not necessary before mandamus to compel county commissioners to levy a tax to satisfy judgments on county bonds.—*Board of Com'rs of Santa Fe County v. Territory of New Mexico*, U. S. S. C., 30 Sup. Ct. 111.

68. Master and Servant—Action for Wages.—In an action by a servant for compensation, evidence of earnings by plaintiff, after his discharge during the time for which he was claiming wages from the defendant, was properly excluded, in the absence of a special plea of such earnings.—*Phillips Lumber Co. v. Smith*, Ga., 66 S. E. 623.

69.—Contributory Negligence.—A lineman employed by a telephone company to remove poles held entitled to assume that the company had inspected the poles beneath the surface of the ground.—*Ia Duke v. Hudson River Telephone Co.*, 120 N. Y. Supp. 171.

70.—Injuries to Servant.—A mine boss and fire boss employed in a coal mine, under Code 1906, secs. 409, 410, are fellow servants of miners employed therein.—*Bradley v. Tidewater Coal & Coke Co.*, W. Va., 66 S. E. 684.

71.—Injuries to Servant—Conductor of freight train held not negligent in giving signal for train to move forward before seeing that a brakeman had gone aboard.—*Van Haaren v. Long Island R. Co.*, 120 N. Y. Supp. 157.

72.—Injuries to Servant.—A company with the power of eminent domain, and authorized to construct railways, etc., for the transportation of passengers and freight, including logs, etc., though its chief purpose was to exploit certain timber land, held a "railroad," and subject to the fellow servant act, and hence responsible for actionable negligence in the operation of the road under a lease and in the exercise of the franchise.—*Wright v. Caney River Ry. Co.*, N. C., 66 S. E. 588.

73.—Risks Assumed.—A fireman who knows that the engine is running backward over a new and rough track does not assume the risk of injury therefrom unless the danger is known or apparent to him.—*Missouri, K. & T. Ry. Co. v. Texas v. Poole*, Tex., 123 S. W. 1176.

74. Mechanics' Liens—Waiver.—The right to a mechanic's lien is not waived by extension of credit, unless the time is extended beyond that within which an action may be commenced to enforce the lien.—*Landsberg & Co. v. Hein Const. Co.*, 120 N. Y. Supp. 190.

75. Mines and Minerals—Deed of Mining Rights.—A deed of mining rights releasing in-jury to surface land held binding on subsequent grantees of the surface lands.—*Kellert v. Rochester P. Coal & Iron Co.*, Pa., 74 Atl. 789.

76.—Regulation of Mineral Waters.—The state may not, under the plea of protecting its natural resources, arbitrarily arrest the work

of an owner of land, beneath the surface of which percolate mineral waters, in extracting from the waters gases for commercial purposes.—*People v. New York Carbonic Acid Gas Co.*, N. Y., 93 N. E. 441.

77. **Mortgages—Improvements.**—The value of permanent improvements by a mortgagee in possession, who supposes himself to have acquired absolute title, will be allowed upon subsequent redemption.—*Liske v. Snyder*, W. Va., 66 S. E. 702.

78. **Municipal Corporations—Defective Street.**—Where a water meter box upon a sidewalk is kept alternately in a safe and a dangerous condition for such a time that, if its condition was always dangerous, notice of the defect would be presumed, one injured thereby need not show notice or knowledge on the part of the city upon each recurrence of the danger.—*City of Rome v. Brooks*, Ga., 66 S. E. 627.

79. **Negligence of Servants.**—The New York Zoological Society held not a governmental agency, so far as to exempt it from liability for injuries to third persons by the negligence of its employees in maintaining its property.—*Gartland v. New York Zoological Society*, 120 N. Y. Supp. 24.

80. **Ownership and Operation of Farm.**—A municipality held entitled to own and control a farm and the buildings thereon, disconnected from any public use, and for its own benefit.—*Libby v. City of Portland*, Me., 74 Atl. 805.

81. **Sewers.**—The filling up of plaintiff's flats on a navigable river by a sewer held a private wrong, so that plaintiff need not show special damages caused by the public wrong in filling up the river in order to recover against the city.—*Whitten v. City of Haverhill*, Mass., 90 N. E. 409.

82. **Navigable Waters — Improvement of Stream.**—United States is not estopped to rely on the five years' limitation prescribed by Act March 3, 1891, c. 561, for constructing an irrigation ditch by obtaining an injunction interfering with such construction.—*Rio Grande Dam & Irrigation Co. v. United States*, U. S. S. C., 30 Sup. Ct. 97.

83. **Negligence—Pleading.**—In an action for negligence, where plaintiff contends that under a statute he should be allowed to recover notwithstanding his own negligence, he cannot invoke the statute where the petition did not predicate on it.—*Stegmann v. Gerber*, Mo., 123 S. W. 1041.

84. **Nuisance—Damages.**—If a nuisance is maintained, a person suing for damages therefrom must have done what he could to save himself from the consequences of the wrong, and all damages which result from the failure to discharge that duty must be borne by him, but such damages cannot defeat his right to sue.—*Carroll Springs Distilling Co. of Baltimore City v. Schnepfe*, Md., 74 Atl. 828.

85. **Officers—Possession of Office.**—While equity cannot determine the question of title to office, it will enjoin interference with discharge of duties of an incumbent, duly elected, and claiming under color of right.—*Hardy v. Reamer*, S. C., 66 S. E. 678.

86. **Partnership—Accounting.**—The death of a partner in a firm which was not actively engaged in business held not to so effectually dissolve it that one of the partners could not compel an accounting for profits for the time between the death and the expiration of the firm as originally agreed.—*Beller v. Murphy*, Mo., 123 S. W. 1029.

87. **Existence.**—In an action by a third person against alleged partners by holding out, the conduct and admissions of an alleged partner is admissible to prove that the act of holding out was done either by him or with his consent. *Ex parte Wilson*, S. C., 66 S. E. 675.

88. **Torts of Partner.**—Where one member of a corporation converts personal property of a third party to the use of the firm, the owner has a right of action at his option against the partnership or against the individual member guilty of the conversion to recover the property converted or its value.—*Thompson v. Harris*, Ga., 66 S. E. 629.

89. **Powers—Rights of Creditors.**—Property incumbered by a general power of appointment

is subject to the debts of the donee of the power when the property passes by virtue of the execution of the power.—*Arnold v. Southern Pine Lumber Co.*, Tex., 123 S. W. 1162.

90. **Rights of Life Tenant.**—A widow authorized to sell her husband's land when necessary for her comfort and support, held entitled to make sales in her reasonable discretion.—*Griffin v. Nicholas*, Mo., 123 S. W. 1063.

91. **Process—Foreign Witness.**—A non-resident witness coming into the jurisdiction to testify in a case to which he is not a party is not deprived of immunity from service of civil process because he has some interest in the suit.—*Chittenden v. Carter*, Conn., 74 Atl. 884.

92. **Prohibition — Jurisdiction of Supreme Court.**—A writ of prohibition is to restrain judicial, and not legislative, executive, or administrative, action.—*State ex rel. McEntee v. Bright*, Mo., 123 S. W. 1057.

93. **Public Lands — Philippine Islands.**—A grant of public land in the Philippines by subordinate Spanish officials receives no support from the decree of the Spanish courts of January 4, 1813, where conditions in such decree were not fulfilled.—*Tiglao v. Insular Government of Philippine Islands*, U. S. S. C., 30 Sup. Ct. 129.

94. **Railroad Land Grants.**—The grant to the Union Pacific Railroad Company by act July 3, 1866, c. 159, 14 Stat. 79, of a right-of-way through the public lands held not to give it the right to run the road through lands in the actual occupation of a homesteader.—*Union Pac. R. C. v. Harris*, U. S. S. C., 30 Sup. Ct. 138.

95. **Quieting Title—Cloud on Title.**—No cloud is cast upon plaintiff's title so as to enable him to sue in equity to remove it where a fatal defect appears on the face of the record through which defendant claims; the legal remedy being adequate.—*Turner v. Hunter*, Mo., 123 S. W. 1097.

96. **Railroads—Crossing Accidents.**—It is a flagman's duty to warn a traveler approaching a crossing in season, to enable him to stop his team at a point where an ordinarily well-broken horse would not be dangerously frightened.—*Huntington v. Bangor & A. R. Co.*, Me., 74 Atl. 802.

97. **Injury to Persons on Track.**—In an action for the death of a person struck on a railroad track, a charge that he was at the time guilty of the "grossest" negligence in sitting on the track held not prejudicial.—*Sherman v. Chicago, R. I. & P. Ry. Co.*, Ark., 123 S. W. 1182.

98. **Reformation of Instruments—Parties.**—A vendor's equity for the correction of an error in the description of the land is available as a defense to the purchaser's suit for possession, if properly pleaded.—*Moore v. Moore*, N. C., 66 S. E. 598.

99. **Release—Damages from Working Mine.**—Where removal of coal causes subsidence of surface, owners of coal held not liable to the owners of the surface, where their grantors had released all claims for damages for such injury.—*Kellert v. Rochester & P. Coal & Iron Co.*, Pa., 74 Atl. 789.

100. **Religious Societies—Injunction.**—Where a majority of the trustees of the church refused to permit the duly appointed minister to hold the services in the church property or reside in the parsonage, the chancery court by final decree had jurisdiction to grant complete relief.—*Tebo v. Hazel*, Del., 74 Atl. 841.

101. **Removal of Causes—Effect of Service.**—Return of a state sheriff is not conclusive as to the validity of service of process on a corporation, where the case had been removed to a federal court by defendant who raises by plea to the jurisdiction in that the person served with process was not its agent at the time.—*Mechanical Appliance Co. v. Castleman*, U. S. S. C., 30 Sup. Ct. 125.

102. **Sale—Action for Price.**—If, after a contract of sale of a car load of lumber was rescinded, the buyer went into the car and took a part of it, it would be a conversion, and the seller could recover only the value of the lumber actually taken, with such damages to the

car load lot as he sustained.—*Teeter v. Cole Mfg. Co.*, N. C., 66 S. E. 582.

103.—**Breach of Contract.**—Where a contract for the sale of personal property fixes no special date for delivery, a breach of the contract exists when the seller notifies the buyer that he will not comply with the contract, and he has notice of the extent of the breach.—*Howard v. Haas*, Mo., 123 S. W. 1048.

104.—**Implied Warranties.**—The implied warranties arising on the sale of goods to be manufactured by the seller does not survive acceptance where a defect in the goods is discoverable on customary and ordinary inspection.—*Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.*, 120 N. Y. Supp. 163.

105. **Seduction—What Constitutes.**—Where a single woman allows an unmarried man to have sexual intercourse with her, relying solely on his promise to marry her in case she becomes pregnant, it is not seduction, but a bargain.—*Woodall v. State*, Ga., 66 S. E. 619.

106. **Specific Performance—Contracts Enforceable.**—Equity will compel a wife to specifically perform her oral agreement to reconvey land to her husband to prevent the abuse of confidence and perpetration of a fraud.—*Gallagher v. Gallagher*, 120 N. Y. Supp. 18.

107.—**Contracts Enforceable.**—Specific performance would not be decreed of a contract by a widow, to whom her husband left his whole estate for life, with power to sell for her support, to convey a portion of the property to defendants in consideration of care and support.—*Griffin v. Nicholas*, Mo., 123 S. W. 1063.

108. **States—Territorial Jurisdiction.**—Where the state of New York has jurisdiction of the waters of the North River for purposes of commerce and navigation, it has power to create a cause of action in favor of the next of kin of one negligently killed by vessels navigating in such waters.—*Carlin v. New York Dock Co.*, 120 N. Y. Supp. 281.

109. **Street Railroads—Care Required.**—Where a street railroad might, by the exercise of ordinary care, have avoided injury to a traveler guilty of negligence in driving on the track, it will be liable for the failure to exercise such care.—*Carroll v. Connecticut Co.*, Conn., 74 Atl. 897.

110.—**Injury to Passenger.**—A carrier held not liable for injuries to a passenger by falling over parcels left in the doorway of the car by another passenger.—*Lyons v. Boston Elevated Ry. Co.*, Mass., 90 N. E. 419.

111.—**Injuries to Traveler.**—A street railway company may not, with knowledge, negligently run down a valuable animal or man on the track, however negligently or unlawfully they may be there.—*Swift & Co. v. New York & Q. C. Ry. Co.*, 120 N. Y. Supp. 203.

112.—**Ordinances.**—Acceptance of a municipal ordinance requiring street railway companies to issue transfers held not to abrogate existing contract right secured against impairment by subsequent legislation to charge five cent rate for passage not exceeding three miles in length.—*City of Minneapolis v. Minneapolis St. Ry. Co.*, U. S. S. C., 30 Sup. Ct. 118.

113. **Taxation—Redemption.**—Acquiring of a tax title by one of two parties owning interests in the same land held a redemption thereof.—*Callahan v. Russell*, W. Va., 66 S. E. 695.

114.—**Tax Deed.**—That the sheriff's acknowledgment to a deed under a tax judgment was taken by the grantee did not render the deed inadmissible in evidence, a subsequent acknowledgment before a different officer being shown.—*Carr v. Miller*, Tex., 123 S. W. 1158.

115.—**Tax Deed.**—That a tax deed was on record so as to give notice to a subsequent purchaser that the land was sold in bulk and not subdivided as required by statute would not give him notice of any resulting damage to the owner so as to authorize a suit to cancel the deed on the ground of such irregularity in the sale.—*Shelton v. Franklin*, Mo., 123 S. W. 1084.

116.—**Tax Title.**—Failure of assessors to verify the tax roll makes the tax and the subsequent sale of the land for its non-payment void.—*People v. Inman*, N. Y., 90 N. E. 438.

117. **Telegraphs and Telephones—Damages for Mental Suffering.**—The addressee of a message announcing the illness of his child held entitled to recover for mental anguish caused by negligent delay in delivery.—*Battle v. Western Union Telegraph Co.*, N. C., 66 S. E. 661.

118. **Trusts—Construction.**—A deed to one in trust to hold for the use of his wife for life, with power of appointment, held to have devested the grantors of the entire fee.—*Arnold v. Southern Pine Lumber Co.*, Tex., 123 S. W. 1162.

119.—**Resulting Use.**—Where a deed to a husband in trust for his wife for life, and for her children after her death, is in the nature of a family settlement, no resulting use in favor of the husband and wife by reason of the consideration having been paid by them in money will be presumed.—*Arnold v. Southern Pine Lumber Co.*, Tex., 123 S. W. 1162.

120. **Vendor and Purchaser—Bona Fide Purchaser.**—A recorded judgment against land for taxes and the subsequent tax sale would put a subsequent purchaser of the land on inquiry so as to charge him with knowledge of the sale.—*Griffin v. Franklin*, Mo., 123 S. W. 1092.

121.—**Pre-Existing Debts.**—A conveyance taken in payment of a former indebtedness does not give to the grantee the legal status of a bona fide purchaser so as to give the grantee preference over a prior unrecorded deed.—*Temple v. Oshburn*, Or., 106 Pac. 16.

122.—**Purchase from Bona Fide Purchaser.**—A purchaser for value from one whose deed was obtained by fraud of which he had no notice takes good title, and one purchasing from an innocent purchaser without notice would take good title even if he had notice of the fraud.—*Phillips v. Buchanan Lumber Co.*, N. C., 66 S. E. 603.

123.—**Unrecorded Deed.**—Undelivered deed from husband and wife to trustees for wife not recorded until after judgment against the husband held invalid as against purchasers at execution sale against him.—*Bauer v. Martin*, Pa., 74 Atl. 740.

124. **Waters and Water Courses—Irrigation Districts.**—In proceedings by owner of land to have it detached from irrigation district, he must show that from some natural cause it is non-irrigable or expressly exempt by statute.—*Sowerwine v. Central Irr. Dist.*, Neb., 124 N. W. 118.

125.—**Regulation of Water Rates.**—A water-works company must disclose the full value of the property and all its earnings and expenses when it assails as confiscatory rates fixed by ordinance.—*McCook Waterworks Co. v. City of McCook*, Neb., 124 N. W. 100.

126.—**Subterranean Waters.**—The right to appropriate springs and subterranean waters held an incident of the ownership of land.—*People v. New York Carbonic Acid Gas Co.*, N. Y., 90 N. E. 441.

127. **Wills—Construction.**—The word "ancestor," as used in a devise of a remainder, held to exclude from the heirs and representatives of a deceased remainderman the husbands or wives of remaindermen who died prior to the life tenant.—*In re Nelson's Estate*, Del., 74 Atl. 851.

128.—**Mutual Agreements to Will.**—A contract between two to will their property in specified ways, or to specified persons, held enforceable.—*Dresumeur v. Rondel*, N. J., 74 Atl. 703.

129.—**Rights of Widow.**—As the law gives the widow absolutely a certain part of her husband's estate at his death, he cannot deprive her of it by will, and, in the absence of a provision requiring her to renounce the provisions in his will, she need not do so, but may ignore it and claim what the law entitles her to.—*Egger v. Egger*, Mo., 123 S. W. 928.

130. **Witnesses—Competency.**—The surviving party to a contract can be compelled to testify against himself as to the terms thereof, in an action thereon by the representative of the other party.—*Jackson v. Smith*, Mo., 123 S. W. 1026.

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A PARTNERSHIP CONDUCTING ITS BUSINESS BY CORPORATIONS AS INSTRUMENTALITIES.

We are indebted to an esteemed subscriber for an advance copy of a very important opinion in Hooper v. Jackson, handed down by Judge Dill, of the New Jersey Court of Errors and Appeals, on February 28th, 1910. By the copy sent, the opinion, reversing Howell, V. C. of the New Jersey Court of Chancery (74 Atl. 130, *sub nom.* Jackson v. Hooper), appears to be by an unanimous court.

It is a matter of somewhat general knowledge among lawyers, that Judge Dill, at the time he went upon the bench in New Jersey, ranked as one of the greatest corporation lawyers in the country and was reputed to be earning, as such, fees, each year, that approximated an almost princely fortune. Whatever leanings he had would, therefore, be supposed to be in a direction of showing the ready adaptation of corporate organization to the needs of commercial enterprise. But this opinion, written in clear, cogent style, appears to tell, between the lines, that Mr. Dill, before he became a judge, was a great corporation lawyer, because he knew, and practiced respect for, limitations upon corporate power. The opinion seems to reflect the mind of one, whose life as a lawyer was to seek and cherish legal principle and not of one, who, under the guise of practicing law, devoted his days and nights to devising schemes to evade its spirit and intent.

The facts showed, so far as necessary to state them for the purpose we have in hand, that Messrs. Hooper and Jackson were carrying on a partnership business, each

owning a half interest and having equal power and authority and with neither to transact any other than matters in routine of business in the absence of the other without his previous assent. This business was carried on both in England and America, being a very extensive and profitable subscription book business, beginning in 1900. For reasons unnecessary to state, the partners organized two corporations, one in England under the name of "Hooper & Jackson, Ltd., " to transact business in England and the other the "Encyclopaedia Britannica Company," in this country under the law of Illinois. All the shares were issued to these two and, to comply with English and Illinois statutes, ten shares of stock were issued to three other persons, who, however, it was alleged, in effect, were mere dummies and were not the real owners of such shares. No corporate meetings were held and accounts were kept both in England and America and no dividends were ever declared. Each partner checked on the moneys in bank as he pleased, and the two corporations were looked on as the instrumentalities of a single business. Differences having arisen, Hooper, by means of stock in his name, together with the stock standing in the names of the dummies, managed matters by having the corporations manage the business, instead of the business managing the corporations.

Jackson, therefore, applied for a receivership for a partnership. The vice-chancellor held there were joint adventures, but the law governing partnership applied. The chancellor, finding as a fact that the whole business was carried on as one, laid no great stress on the fact that corporations were mere agencies in the matter, except that being such the mere appearance of stock ownership in dummies could not be taken advantage of by Hooper to oust Jackson from his equal right and power, as formerly exercised.

Judge Dill considers that whether the business was a partnership or joint adventure at the beginning is immaterial, as by act of the parties it had come to be the business of two corporations, and the policy of the law forbids its being considered from any other standpoint. His summary is as follows: "We hold that the parties are not partners as to the corporate property, but merely stockholders in two foreign corporations, distinct legal entities; that the agreement whereby these dummy directors were bound to act in accordance with the will of the complainant and Hooper was illegal and therefore unenforceable in any court; that the whole subject matter of the controversy relates to the management of the internal affairs of two foreign corporations; that the Court of Chancery has no jurisdiction to entertain the bill," etc. In short, the court holds, that whatever was the purpose and intent of these partners and whatever course they pursued afterwards, when they formed corporations and transferred their respective holding therein title passed to the corporations and continued there to remain as well between the owners of all of its shares of stock as outwardly to the world.

Judge Dill says: "The law never contemplated that persons engaged in business as partners may incorporate, with intent to obtain the advantages and immunities of a corporate form, and then, Proteus-like, become at will a co-partnership or a corporation as the exigencies or purposes of their joint enterprise may from time to time require. * * * They cannot be partners *inter se* and a corporation as to the rest of the world. Upon grounds of public policy the doctrine contended for cannot be tolerated, as it renders nugatory and void the authority of the legislature—a co-ordinate branch of the government—established by the constitution, in respect to the creation, supervision and winding up of corporations."

He then cites numerous English cases in support of the view that, if the corporation is a legal entity, it owns the property and if it is not such entity, it cannot be an instrumentality. He then traces back American decision to the same effect. In discussing the alleged agreement between Jackson and Hooper, that the other shareholders should be mere nominal directors subject to dictation and control and its enforceability, he says: "The law confides the business management of a corporation to its directors. They represent all of the stockholders and creditors and cannot enter into agreements, either among themselves or with stockholders by which they abdicate their independent judgment."

This principle is undoubtedly sound, but, if one were to follow the ruling in *Old Dominion S. C. & M. Co. v. Lewisohn*, 210 U. S. 206, which we considered in 70 Cent. L. J. 219, might it not be answered: Yes, but if Jackson and Hooper owned the corporations could they not do as they liked in this, and have either dummy or real directors as they saw fit?

Judge Dill speaks here of their duty to creditors notwithstanding, that here was a business overflowing with surplus wealth, and we conceive that he meant that directors' obligations to be independent were not thereby made a mere form.

There runs through this opinion a lofty sentiment, and the lesson taught is, that statutory or constitutional regulations of corporations are not mere forms which are to be neglected so long as third persons acquire no interest in their observance, but that, when the status is chosen to which these regulations apply, a former status is definitely and for all purposes abandoned.

It is only upon this principle that corporate existence with its privileges, liabilities and exemptions may be adjudicated upon, unembarrassed by extraneous considerations.

NOTES OF IMPORTANT DECISIONS.

APPEAL AND ERROR—PENALTY OF REVERSAL ON APPELLEE FOR FAILURE TO FILE BRIEF.—We have read of courts complaining of too many and too long-winded briefs, and we had rather reached the conclusion that the fewer and briefer the briefs the brevity, numerically and physically, was the more appreciated. We also have occasionally seen and read of cases where both parties wanted a new trial and courts being of the view that the public had contributed as much in expense and trouble and in demand upon other people's time as the parties were entitled to, no concurrence of desire on the part of suitors had anything to do with the question. But a rule and its application in Oklahoma Supreme Court, made for its convenience in dispatch of business, appears to point the way for this mutual dissatisfaction being appeased.

This rule provides for filing of briefs by counsel and "in case of failure to comply with the requirements of this rule, the court may continue or dismiss the case, or reverse or affirm the judgment." See *Butler v. McSpadden*, 107 Pac. 170.

In this case counsel for appellee failed to file a brief, and the court said, Williams, J., dissenting: "We have read the brief filed by counsel for plaintiff in error and from a consideration thereof it seems to us that the point made that the judgment lacks evidence sufficient to sustain it is well taken. In the absence of a brief on the part of counsel for defendant in error, we are not given that assistance which we should have in determining the theory upon which the court rendered its judgment, and the pressure upon the time of the court is such that it cannot, in justice to other litigants, brief cases for parties who elect to neglect it."

We do not know whether the court did anything further in this case than look at the brief filed by plaintiff in error, but we see that it denied that the case should be reversed without a remand, and it was reversed and remanded. Appellee's failure may even have helped him.

We do know that the court cited authority that the appellate court would "assume without looking at the record, that the point urged by appellant that the evidence is insufficient to justify the findings attacked is well taken." This is said to be the California rule, as see *Richter v. Imgston*, 101 Cal. 582.

The Kansas Court of Appeals has gone almost to a like length, but not quite. It said it

would not carefully search the record to see if there was evidence to sustain a judgment, where appellee filed no brief. And there may be a few other cases that squint that way.

But the rule seems to us wrong. An appellate court may very properly make a rule for the filing of briefs and penalize appellants to the extent of not examining into cases for violation thereof. But an appellee is before an appellate court with a judgment presumptively correct, and he is entitled to stand on it until by an examination of what it rests on it appears to be incorrect. Until the burden of attack thereon has been met and shifted his vested right in that judgment should be recognized.

Every jurisdiction recognizes validity of a judgment in trial court, because no supersedeas can arrest its enforcement until security for its payment shall have been given.

If this is true, ought not an appellee's standing in an appellate court to be regarded as that of a privilege, the non-exercise of which takes away from him no right that ought not to be taken away.

All courts say briefs are desired for "assistance" to the court, but we greatly doubt whether any are filed for such an altruistic reason, and the courts know they are not. The appellee files a brief because he fears the court may be misled, but if his fear is not keen enough to make him put up cold cash he ought to be allowed to elect.

We do not know if Oklahoma practice allows appellee's brief to be taxed as costs. We do not believe this is often allowed.

PUBLIC HEALTH—REGULATIONS AS TO LICENSES TO UNDERTAKERS AS BEING IN CONFLICT WITH FOURTEENTH AMENDMENT.—A New York statute requiring that no person could be licensed as an undertaker unless he shall also have been licensed as an embalmer and shall have been an assistant to a licensed undertaker "continuously" for at least three years, was lately condemned as violative of the Fourteenth Amendment of the Federal Constitution, the decision being an unanimous one by New York Court of Appeals. *People v. Ringe*, 90 N. E. 451.

The statute was attempted to be defended under the state's police power, exercised in respect of the public health.

The court freely concedes that it is within the state's police power to regulate the care of dead human bodies, and their disposition by burial or otherwise, as all of this is closely related to the health and general welfare of particular communities. This statute, however, appeared to the court as being so arbit-

trary and unreasonable in its requirements, that the court was convinced it "was conceived and promulgated in the interests of those then engaged in the undertaking business, and that the relation which the business bears to the general health, morals and welfare of the state had much less influence upon its origination than the prospective monopoly that could be exercised with the aid of provisions."

Nothing, therefore would seem so sacred as to be immune from attack by the commercial spirit. Death, instead of arresting, is attempted to be made an adjutant in its behalf.

The opinion quotes very extensively from *Wyeth v. Board of Health*, 200 Mass. 474, 86 N. E. 925, 128 Am. St. Rep. 439, from which is quoted approvingly the following: "No argument has been addressed to us to show that the general embalming of dead bodies is necessary for the preservation of the public health, and we know of no facts that indicate such necessity. Except in those cases where embalming is desired for a special reason, we know of nothing connected with the duties of an undertaker that calls for the work of a licensed embalmer. In cases generally it is not an essential part of the duties of an undertaker and it has no relation to the public health."

It was further said the "continuous service" requirement was arbitrary, if intended to exclude all other, as the only requirement the state can make is length of service, whether continuous or interrupted, which would presume qualification in one applying for a license as an undertaker.

The bold attempt by this kind of legislation to turn a power for the benefit of the community into foisting upon it a monopoly seems to us most rightfully and forcefully rebuked. The court well said: "The business of undertaking has been carried on for generations, particularly in the rural districts, by persons not holding embalmers' licenses, and who have no special knowledge of the work of embalmers." If detriment to health from the lack of embalming has not been proven, it would seem useless to hope it ever will be.

ELECTRICITY—THE SUBJECT OF LARCENY.—Judge Charles S. Lobingier, judge of the Court of First Instance for the Judicial District of Manila, lately decided that electricity was the subject of larceny or its Spanish equivalent "hurto." U. S. v. Jose de Leon, Feb. 3d, 1910 (not reported.)

The article under the penal code, under which prosecution was brought, read, as translated in the opinion, as follows: "The following are guilty of larceny (hurto): Those who, with intent of gain and without violence or

intimidation, against the person or force against things, shall take another's personal property without the owner's consent."

The judge came to the conclusion that it was, because by decisions by the Spanish Supreme Tribunal, rendered in 1887 and 1897, construing a similar section in Spanish law, it was held that the appropriation of illuminating gas belonging to another was "hurto," or larceny.

The chief contention made was that electricity was an energy and not a corporal substance, but the judge thought that, as its effects, like those of gas, could be seen and felt, and the act of appropriation in each case consisted in the production of the effects, which appropriation involved or resulted from the consumption of enforced things, the rule as to gas should obtain. Authority was cited to show that the common law agreed with the Spanish as to gas.

Here a door would seem open for a very interesting inquiry, and assuming that Spanish jurisprudence rests on the principles of the civil law, it would seem the learned judge should have sought his rule there, instead of resorting to the common law at all. The old common law refinements about asportation, etc., may have their counterparts in the civil law, but it has seemed to us that the law of larceny has always presumed that taking or asportation was in the single act of the thief and depended on no contingency of the happening of a subsequent act put in motion by another.

Let us illustrate as to an undoubtedly corporal substance. Suppose water is to be turned into an irrigating ditch at a certain time, and in advance thereof one not entitled to use the same arranges for its diversion. Certainly there is no larceny until diversion results, and then it comes through the intervening act of another. Taking then is aided, or, as we might say, asportation is accomplished, by a lawful act. So might it be if the wrongdoer connects his pipe or wire with another's as the expected source of supply of gas or electricity, when this shall be afterwards turned on.

If gas or electricity is not diverted so instant the connection there would seem to be a mere trespass, and yet whether it is immediately diverted or not depends upon the flow being continued. If one were conveying apples by some sort of endless chain and there was a manual caption as they were passing along, this would be larceny, but if there was a mechanism installed in advance to catch them as they may be made to pass, here would be another question. The mechanism would not distinguish between good apples and bad apples, and all

our notions about intent and alibi must to some extent be reformed if this is larceny.

CORPORATIONS—SUBSCRIPTIONS UPON CONDITIONS NOT COMPLIED WITH.—We discussed, in a comparative way, in 70 Cent. L. J. 219, two decisions respectively by the Federal Supreme Court and the Massachusetts Supreme Judicial Court on the question of the fiduciary relation of promoters to a corporation. We thought the former of these two decisions found a reason for exception to a principle which had no salutary basis in principle.

The case of *Sigler v. R. W. Winstead & Co.*, 125 S. W. 272, decided by Kentucky Court of Appeals, proceeds on the theory that if a promoter solicits a subscription it is his business not merely to answer honestly and fairly all questions that may be asked him about the corporation or proposed corporation, but he is not allowed by silence to lead a proposed subscriber to believe that previous subscriptions are not what they appear to be, when the promoters know the contrary was true.

The facts in this case showed that a subscription to a business enterprise provided for its becoming effective when bona fide subscriptions to a certain amount were obtained.

This was only accomplished by counting subscriptions to which were annexed secret agreements for reduction in price, payment in goods, services, etc. The subscribers proposing to pay cash were held entitled to cancel their subscriptions, notwithstanding that promoters offered to make up the difference in the other subscriptions.

The court said: "Each one as he subscribed, not only had the right to rely upon the integrity of the paper as presented to him, but he was justified in the belief that the subsequent subscriptions would be taken so as to meet the requirements of the contract, to-wit: at 100 cents on the dollar, and be payable in cash."

It is a ruling like this, which serves to make more precarious the boosting of fake enterprises and the more salutary business conditions. A promoter who evolves an idea, which his persistency in nerve and persuasiveness may develop, comes to regard himself as a sort of Columbus in discovery. Probably statutes may evolve some plan to secure good faith in representations of these promoters, and tentatively we suggest that no promoter's shares shall be issued to him until all others are taken, except to the extent he pays actual cash therefor, and that these and those to be issued to him upon property or services be impounded to answer any injury suffered by

another, for misrepresentation in obtaining subscriptions. A promoter ought not to have a vote in organization or be allowed to qualify as a director, except upon a cash subscription, and even then he should not be allowed on the board, if the main asset of a proposed corporation is property proposed to be transferred to the corporation, until some fixed period shall have elapsed thereafter.

A REVIEW OF AUTHORITIES UPON THE CONSTITUTIONALITY OF THE FEDERAL CORPORATION TAX STATUTE.

This statute has been discussed by law magazines, newspapers and in speeches, with respect to its constitutionality and the claimants for and against constitutionality have endeavored to sustain their conclusions by decisions of the federal supreme court. There is no very great multiplication of authority in diversity of view, but the cases referred to are fairly numerous and it is our purpose to present all or nearly all of these, grouped or classified and compared, to indicate as far as possible what of adjudication there is, which may be of importance upon this vexed question.

I.

What is the Thing Taxed?—This preliminary inquiry ought to help in the classification we purpose making. And right here we find ourselves in a state of doubt. The first section of the act most assuredly does not apply to any foreign corporation *not* engaged in business in this country and it is equally certain, that the tax as to it is not upon any income other than of business "transacted and capital invested" in this country. Therefore it may be confidently said, that a foreign corporation merely having investments in this country, but doing no business here, does not come within the statute. Therefore further, it may be said, with certainty, I think, that the tax as to a foreign corporation is upon the privilege of doing business.

But how stands the matter as to domestic corporations? Do they have to be "engaged in business" in this country to be-

come subject to the tax, or, if they merely have investments and do no business are they subject to the tax? The words "engaged in business," etc., might be claimed to qualify only foreign corporations, but such limitation is more difficult to be claimed for the words "with respect to the carrying on of business," etc., following after "shall be subject to pay annually a special excise tax" which words, beyond any peradventure of doubt, apply both to domestic and to foreign corporations. Up to this point in the section it looks like the doing of business is a condition absolute to becoming subject to the tax. But the domestic corporation is taxed differently from the foreign. The former is taxed upon income received "from all sources," and that this includes what does not arise from the transaction of business, the exception stated being in regard to dividends from corporations also subject to the tax. Does this difference show that there is a tax upon domestic companies, as if they were natural persons, and, therefore, two different kinds of tax provided, one on domestic corporations, whether they do business or not, and another on the privilege exercised by a foreign corporation to do business? That the tax on domestic corporations may embrace their investments outside of the United States, while that on foreign corporations touches only their investments in this country, seems not decisive of this inquiry, for, whether the tax be merely on a privilege to do business in one or both cases, it is different, and in favor of the foreign corporation. There is at least a difference in estimating the income to be taxed, and the *rationale* of its allowance exists under one aspect of this matter the same as under the other, because it is certain it is a tax upon privilege, merely, so far as foreign corporations are concerned.

It is difficult to see how with merely a distinction between the basis for computing the tax it may be thought there are two kinds of tax attempted to be imposed. Therefore, I take it, that the tax is upon one thing—the privilege of doing business—

and that every domestic business corporation is presumed to be engaged in the transaction of business in the United States, so long at least as it is a going concern. If its income is entirely from investments, it does business in exercising its judgment about its investments and reinvestments, as its policy, through its board of directors, may require.

II.

As a Tax on this Privilege is the Tax Constitutional?—This question should be subdivided with reference to domestic corporations and foreign corporations, and again by classification of domestic corporations into state, congressional and territorial. If it may be thought the tax is constitutional as to some one or more of these corporations, but not as to all, then the question would arise as to separateness, so as to save or not the legislation.

Let us take the corporations in the order indicated, first considering domestic corporations "organized under the laws of any state?"

If, as is now assumed, this is a tax upon the right of a private corporation organized under state law to do business, is it constitutional?

In *The Collector v. Day*,¹ it was decided that the tax by the federal government of the salary of a judicial officer of a state was unconstitutional because this was taxing "the means and instrumentalities" necessary for a state to carry on its government. In *Mercantile Nat. Bank v. New York*,² the obligations of indebtedness of states were similarly non-taxable.³ So as to municipal bonds. Both of those were deemed taxes upon the power of the state and its instrumentalities to borrow money. In *Pacific Ins. Co. v. Soule*,⁴ it was decided that a tax on business is not a direct tax and therefore constitutional. The business there happened to be by an insurance company, but it came under the designation "all persons," etc., and therefore the question here, seems not there, involved—condition-

(1) 11 Wall. 112.

(2) 121 U. S. 138.

(3) *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S. 429.

(4) 7 Wall. 433.

ing the doing of business by a state corporation which in the Soule case stood like an individual to the government upon its doing business when an individual is not now so conditioned. South Carolina v. United States,⁵ has been claimed to derogate somewhat from the principle, that a state instrumentality cannot be taxed by the federal government, as there the state dispensaries were taxed on the sale of liquor. But I do not so construe this holding. The logical effect of the holding is that the state cannot by legislation make a corporation or agency municipal in its character so as to defeat federal taxation, if the doing of things by or through that corporation or agency is engaging in private business. But here is furnished an opportunity to state clearly, by illustration, the point which seems to me to be involved. Suppose an internal revenue law were to declare that no revenue tax should be imposed on the sale of liquor, unless it be sold by state dispensaries. Would not that be a law aimed at the exercise by a state of a constitutional power and therefore invalid? Suppose again this tax was attempted to be imposed only upon corporations organized under state laws and foreign corporations, congressional and territorial corporations engaged in business were not taxable, would this not be legislation likewise aimed? But is there not just as patent a discrimination between state corporations and natural persons, and does it not equally aim, by necessary construction, at the constitutional right of the state to create corporations? As the distinction between natural persons and corporations found in this act has not been heretofore attempted we have no precedents on this subject.

III.

The Inheritance Tax Cases.—It has been claimed that the power of congress to impose a succession or inheritance tax is authority for deduction from what would otherwise be distributed to shareholders in net income. But it seems to me the under-

lying principle in the succession tax cases decided by the supreme court is easily differentiated from what is here the question. In United States v. Perkins,⁶ the question was whether the United States took its bequest free of state charges for transmission, and in Snyder v. Bettman,⁷ the correlative proposition was whether Springfield, Ohio, took its bequest free of the federal tax. Both the national government and states were held to have the power to impose such a tax. It was said the tax was valid because it was a tax "not upon property, but upon the right to succeed to property," and there was no conflict "with the proposition that neither the federal nor the state government can tax the property or agencies of the other." In the case of income of a corporation there is a vested interest inhering in shares of stock, and it would be depriving shareholders of property without due process of law to prevent its being paid. If the government can not take the whole of the income, how can it take any part? If it can take a part, may it not take the whole?

IV.

Income "from All Sources."—It seems difficult to claim that income from all sources is not intended to cover income derived from property which congress has no power to tax either directly or indirectly, or from rents, a tax upon which is forbidden as being direct, because the specific exception is of dividends from companies subject themselves to this tax. But it has been claimed that, because a bank may be taxed on the amount of its deposits though it has money invested in government securities,⁸ and tax may be laid upon the privilege of taking property by will, though it be government bonds,⁹ this question is foreclosed. But just as in the latter case the tax is on a privilege, so it was in the former, the state putting this tax on the corporation's right to exist. See also Home

(6) 163 U. S. 625.

(7) 190 U. S. 249.

(8) Society for Savings v. Coite, 6 Wall. 594.

(9) Burdeck v. Ward, 178 U. S. 139.

Ins. Co. v. New York,¹⁰ where a state statute taxing certain corporations on "net earnings on income from all sources," though some of these came from interest on United States bonds, and compare with N. Y., Lake Erie, etc., Co. v. Pennsylvania, where tolls paid by a railroad doing interstate commerce were taxable only as to the proportion of its line within the state. Just as the state was not allowed to lay a tax on tolls outside of its borders, because it affected the privilege of the railroad to engage in interstate commerce, so the federal government cannot tax the privileges of state corporations to acquire income from state and municipal securities. It does seem to me that, if a state cannot tax the privilege of a corporation to receive tolls from its lessee engaged in interstate commerce, so far as those tolls are payable for extra-territorial service, then congress may be forbidden to tax moneys paid to a corporation in themselves not taxable, when the privilege of the corporation to exist is over and beyond any power of congress to prevent. This reasoning applies to income derived from everything non-taxable by the government of the United States.

V.

The Pollock Cases.—The income tax law decided by the Pollock cases to be invalid provided that: "In computing incomes the necessary expenses actually incurred in carrying on any business, occupation or profession shall be deducted and also all interest due or paid within the year by such person on existing indebtedness." While the method of arriving at net income in this law has more in the way of deduction, there seems nothing in the way of escape from the ruling in the cases that a tax on net income was invalid in so far as it was derived from property, and "all sources" includes business and property.¹¹ This result repudiated the old theory, or rather approved its repudiation in a later case, that receipts from a non-taxable source being covered into the hands of the collector and forming part of an indistin-

(10) 134 U. S. 594.

(11) See *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601.

guishable mass lost their distinctive character, as decided in *State Tax on Railway Gross Receipts*,¹² the approved repudiation being announced in *Phila., etc., S. S. Co. v. Pennsylvania*.¹³

VI.

The Uniformity Clause of the Constitution.—This clause was not considered by the Pollock cases, that is to say, there was no decision of the question in the first of these cases, as the court stood equally divided, and in the second case the decision went upon other grounds. But since those cases were decided the construction of that clause has been concurred in by eight of the court then sitting, Justice Peckham taking no part in the decision.¹⁴ In this case it was held there was merely meant a geographical and not an intrinsic uniformity that is to say, "laid to the same amount on the same articles in each state," though the burden of this might be felt more in some parts of the country than others.¹⁵

VII.

The Exemption Feature as Creating Inequality.—In the decision of the first of the Pollock cases, eight of the nine judges sitting, it was urged among other reasons that there was an inequality and lack of uniformity in the exemption, but the court was equally divided on this question. But it is claimed that a later decision sustaining a statute laying an excise tax on incomes from certain businesses having receipts in excess of \$250,000 a year,¹⁶ and another sustaining taxes according to a progressive rate, dispose of such a contention. As to the Spreckles case, it is to be said no point of this kind was discussed at all. The cases in which a progressive rate of tax was imposed were inheritance cases, and as the court ruled this tax was based on a right to succeed to property and not on property, they might not be considered controlling.¹⁷ In the case of this tax

(12) 15 Wall. 284.

(13) 122 U. S. 326.

(14) *Knowlton v. Moore*, 178 U. S. 41.

(15) See, also, upon this question, *Patton v. Brady*, 184 U. S. 608.

(16) *Spreckles v. Sugar Refining Co.*, 192 U. S. 397.

(17) *Knowlton v. Moore*, *supra*; *Magoun v. Illinois Trust, etc. Co.*, 170 U. S. 283.

it is either on property or it is on the right of a corporation, as distinguished from a natural person, to engage in business. The Spreckles case was a tax on receipts in a business, but the statute referred to persons, companies and corporations engaging in such business. What, however, is the sort of inequality that this exemption brings about? One corporation with 1,000 shares has a net income of ten thousand dollars; this exemption cuts its taxable income down to one-half and the ultimate payer of the tax is relieved of fifty per cent of the general burden. Another corporation with a like number of shares has a net income of fifty thousand dollars and the benefit the ultimate payer gets from the exemption is ten per cent. Putting it differently, the individual, who cannot be taxed under such a statute, as the Pollock cases hold, yet has a deduction from what is coming to him in one case, of fifty per cent of his income, and in the other ten per cent. Is that even geographical uniformity?

Corporations Not Considered in Pollock Cases.—As the former income tax law was held unconstitutional in parts only and it was deemed, that these parts were so connected with what was constitutional as to make the entire law fail, the question of corporation incomes as being corporate property where they were ready to be distributed as dividends, instead of being the property of the shareholders, was not passed upon. It might be easy to see why an income tax law might be aimed at incomes of natural persons and not at profits of corporations, because what of their profits is paid to shareholders goes to swell the latter's incomes, making them ultimately taxable in the final resting-place of profits. But to tax profits of corporations and not the incomes of individuals, not otherwise arising, is in its essence to say that individuals are taxed upon their shares of stock. Then the question comes up whether this is not a direct tax levied without any constitutional apportionment. The supreme court, looking behind the form of the tax to its real effect would have to say this is a

tax on the profits of a *chose in action*—a share of stock, and by the decision in the Pollock case, it is unconstitutional.¹⁸

VIII.

The Indivisibility Feature as to What is Controlled by the Pollock Cases.—The Pollock cases decided two points and held that their unconstitutionality carried the conclusion that congress did not intend that the law should exist in their absence. These two points were that taxes on real and personal property and on the rent or income from either were direct taxes and not leviable except through constitutional apportionment. If, therefore, income from all sources is by this statute to be construed to embrace either of the above things, is the statute to stand with such source of income eliminated? One of the prime difficulties lying at the threshold seems to me either to get the supreme court to overrule the Pollock cases as to these taxes, or to show this broad language was not intended to embrace such income, or that the same result in indivisibility of sources of income does not follow from the same elements of illegality.

N. C. COLLIER.

(18) As to whether the tax is or not on shareholders see 70 Cent. L. J. 91, and authorities cited.

INCEST—PRIOR ACTS OF INTERCOURSE.

SKIDMORE v. STATE.

Court of Criminal Appeals of Texas, December
22, 1909.

In a prosecution for incest alleged to have been committed in December, evidence of other acts of intercourse by accused with the prosecuting witness in October and November was not admissible; one act of intercourse being sufficient to constitute the crime, under Pen. Code 1890, art. 349.

DAVIDSON, P. J.: The state relied upon the testimony of prosecutrix. Under her testimony she was an accomplice, having consented to the intercourse, about which she

testified. Appellant's testimony is that he was not guilty, and was not intimate with prosecutrix, but that she was intimate with others, and introduced such evidence along those lines as the court would permit. Testifying in his own behalf, he denied any act of intercourse and offered testimony, much of which was rejected, going to prove bad conduct on the part of prosecutrix with other men. Over appellant's objection, the state was permitted to introduce evidence of acts of intercourse between prosecutrix and appellant other than that relied upon for conviction. The act relied upon occurred in December. The other acts under her statement occurred during the previous months of October and November. We are of opinion this evidence was improperly admitted. It seems from the bill of exceptions the court admitted this testimony under the authority of the recent case of *Barrett v. State*, 55 Tex. Cr. R. 182, 115 S. W. 1187. That case was decided upon the authority of *Burnett v. State*, 32 Tex. Cr. R. 86, 22 S. W. 47. The *Burnett* case had been overruled in *Clifton v. State*, 46 Tex. Cr. R. 18, 79 S. W. 824, 108 Am. St. Rep. 983, and followed in *Gillespie v. State*, 49 Tex. Cr. R. 530, 93 S. W. 556; *Wiggins v. State*, 47 Tex. Cr. R. 538, 84 S. W. 821, and *French v. State*, 47 Tex. Cr. R. 571, 85 S. W. 4. In deciding the *Barrett* case, *supra*, this court overlooked the fact that the *Burnett* case, *supra*, had been overruled in *Clifton v. State*, and followed in subsequent cases. We are of opinion that the case of *Clifton v. State* and subsequent cases are correct. Incest is not a continuous offense. One act of intercourse is a sufficient predicate upon which to base a conviction. This has been held in all of the cases, and may be said to be without exception. And it is necessarily so under the definition of the offense as found in article 349 of the Penal Code of 1895. The same rule obtains in rape cases. A single act of rape or incest, either, if proved, is sufficient to justify a conviction. Such is the rule in Texas, and such seems to be the rule in all the states. This rule does not apply, however, to adultery. Under our statute adultery may be constituted in one of two ways, first, by living together, and having intercourse, or by having habitual carnal intercourse without living together. This makes it in a sense a continuous offense. In other words, the definition of "adultery" has such characteristics that one act is not sufficient unless where the parties are living together. The rule has been laid down and followed in many of the states that prior acts of illicit intercourse between the parties are inadmissible as corroborative evidence. The office of this corroborative evidence seems to be under the authorities, to render it probable that by rea-

son of the prior act or acts a party would be the more likely guilty of the acts for which he is being tried. This rule has not been followed in all of the states, and the reason for the rule is not founded upon sound principles. Prior acts, under such circumstances, may be introducible; but where the state has made out its case the rule does not obtain. These exceptions are well known to courts and the profession. This character of evidence introduced through the mouth of prosecutrix certainly could not corroborate her statement, for she is an accomplice, and cannot corroborate herself. If the other acts of intercourse between the parties in rape and incest were admissible, then it is a self-evident proposition that the accused has a right to defend against each act introduced, and meet it with such testimony as he can show that it did not occur. Under this state of case, the accused would be authorized to defend against an indefinite number of illicit acts introduced by the state which are in no way connected with the one for which he is being tried, and the trial would stretch out over such transactions for perhaps years. Under these circumstances the trial on the main case would be lost sight of in introducing evidence pro and con as to the prior acts. Under such state case, appellant would be called upon to answer for such acts of illicit intercourse about which he had no notice in the indictment, and of which he was in no way legally apprised would be used against him; and it would doubtless further result in a conviction on general principles instead of for the particular offense alleged against him. This court has for years held, in incest and rape, evidence of prior acts inadmissible, and the decisions place the two offenses in this respect upon the same basis. We believe the rule ought to be, in this character of cases, and all others, that the accused should be tried for the offense of which he is indicted, and that the state would be prohibited from going out and hunting up the derelictions of a life, or for years, and inject them into the case simply to show the probability that, because he had heretofore been guilty of something, therefore he might be guilty in the case on trial. We think that on sound reasoning and on principle and decisions in *Clifton v. State*, *supra*, and those cases that follow it, are correct and enunciate the correct doctrine. The *Barrett* case, 55 Tex. Cr. R. 182, 115 S. W. 1187, therefore is overruled. We hold, therefore, upon a review of the whole question, that the rule laid down in the *Clifton* case, *supra*, and those cases that are in accord with and follow it, is correct.

Judgment reversed.

NOTE—Admissibility of Prior Acts of Intercourse in Incest Cases.—We find no cases in accord with the principal case, but the reasoning that finds an exception in sexual cases appears to us as inherently weak and contradictory in the cases, which we set forth in this annotation. In People v. Stratton, 141 Cal. 604, 75 Pac. 166, the court ruled that it was competent to show frequent acts of intercourse with the defendant father, but no argument therefor was advanced, there being merely citation of authority of cases which are referred to among others in this note. The prosecutrix was not permitted, however, to be asked on cross-examination about intercourse with others, as this "would in no way have tended to disprove the charge" and the case of State v. Winnenbaum, 124 Mo. 423, was quoted from, where it was held that reputation or character for chastity and virtue was not material. But when later on the state showed by medical evidence the condition of her sexual organs, the court said she could have been recalled, but was not, and questioned about intercourse with others. The distinction here seems a very narrow refining, if it has any basis whatever. There could be no dispute in recognized physical laws about condition of organs as arising from intercourse with one or several persons, if intercourse was frequent. The court seemed not well satisfied with its ruling and disposed to shift responsibility therefor. This case does not cite prior California cases. In People v. Patterson, 102 Cal. 239, it is said cases of incest and adultery are exceptions to the general rule, as well settled, that proof of a distinct and different offense is not allowed, and it cites, among others, the case of People v. Cunningham, 66 Cal. 668.

Why the Patterson case should have been referred to is somewhat difficult to apprehend or even imagine. It was a larceny case and no allusion whatever is made to cases of sexual intercourse and the general rule as to admissibility of evidence of other offenses is stated to be, to show "connection between the offenses in the mind of the criminal," itself an exceedingly broad statement. The court says: "When such connection is shown, evidence of the others is admissible for the purpose of establishing identity in developing the *res gestae* or in making out the guilt of defendant by a chain of circumstances connected with the crime with which he is on trial." If it does not serve for such purpose it is inadmissible. The later California cases say distinctly sexual cases are exceptions to this rule.

In Taylor v. State, 110 Ga. 150, 35 N. E. 161, the court admitted testimony by the female of acts of sexual intercourse prior to the time within which prosecution would be barred upon a principle stated in 2 Greenleaf on Ev., sec. 43; that: "Where criminal intercourse is once shown, it must be presumed, if the parties are still living under the same roof, that it still continues, notwithstanding those who dwell under the same roof are not prepared to depose to that fact." The philosophy of this reasoning is somewhat obscure when the prosecutrix is the sole witness to the prior acts, and still more obscure when no one else under the same roof is prepared to depose to the subsequent acts. That is something like the logical absurdity of proof of *idem per idem*. If independent evidence showed the prior acts the corroboration by proof of opportunity for continuance would be clear. In the

same paragraph of the opinion the court recognizes that such proof of corroboration is in some sense weak, as it "cannot be regarded as affording the kind of corroboration which the law makes necessary to support the testimony of an accomplice," as this "must come from a source or sources other than his or her own testimony." It seems to me that the testimony was merely admitted for the purpose of testing the accuracy of her statements, as to subsequent acts, and thus show the charged act within the statutory period. That, it would look like it is a matter proper for cross-examination, and not an excuse for the state eliciting damaging evidence against the accused. No stress is laid upon sexual intercourse being exception to the ordinary rule.

Lefforge v. State, 129 Ind. 551, is precisely like the Stratton case *supta*. It cites prior cases and those from other states. The principal Indiana case on this subject is State v. Marks, 95 Ind. 464, in which the authorities are reviewed. This case proceeds on the theory that "evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force." Therefore, it is said: "It cannot be doubted that it is competent to show the previous intimacy between the persons charged with incest, their behaviour towards each other and their acts of impropriety and indecency."

But where would the logic of such a rule take us? Suppose we apply this quality of reasoning to a case of burglary. A is acquainted with B and knows that the latter is careless in the protection of his premises, or that he is somewhat of a criminal and timid about prosecuting for burglary, and, therefore, it is competent to prove a prior burglary by A for which B instituted no prosecution, as leading to the probability that A, knowing of opportunity and that he would probably not be prosecuted, committed the act of burglary for which he is on trial. Similar reasoning might be applied to a case of obtaining money under false pretenses, and to such an endless variety of cases as would, practically, make exceptions supplant the recognized rule about distinct offenses not being provable.

We can conceive why testimony of antecedent acts of intercourse would be admissible to show intent in the doing of that which otherwise might have little probative force. Thus, if a relative were seen going into or issuing from the room of a female in the household, this might not be so opposed to the familiarity existing among members therein as to carry even suspicion of improper relations, while proof of such relations antecedently would tend to stamp the intent of his presence in the room. But if merely the bare fact of intercourse is shown, that seems no more than the bare fact of any other criminal offense. In State v. Hurd, 101 Iowa, 391, it was said, it is "the rule as to adultery and crimes of that character that similar acts between the parties, not contemplated by the charge, may be shown to disclose the relation and disposition between the parties as bearing on the probabilities of the act as charged." But why not the same rule as to conspiracy? Adultery is, in its nature, conspiracy, and so might be incest, especially if the female is an accomplice. In Smith v. Com., 109 Ky. 685, 60 S. W. 531, both the male and female were being tried

and there was evidence of two acts by different witnesses. *State v. De Hart*, 109 La. 570, 33 So. 605, merely states the rule of testimony of prior acts being admissible, but the opinion shows nothing as to who may testify to such acts.

An opinion by Judge Christiancy in *People v. Jenness*, 5 Mich. 305, is approved in *People v. Skutt*, 96 Mich. 449, 56 N. W. 11, as clearly stating the reasons for the admission of acts of sexual intercourse, in incest. The facts in that case show the prior acts were testified about by the female. Judge Christiancy said: "The general rule in criminal cases is well settled, that the commission of other, though similar offenses, by the defendant, cannot be proved for the purpose of showing that he was more likely to have committed the offense for which he is on trial, nor as corroborating the testimony relating to the commission of the principal offense. But the courts in several of the states have shown a disposition to relax the rule in cases where the offense consists of illicit intercourse between the sexes; and it is principally to the American cases that we are to look for authorities on this subject." The point was made that the testimony ought to be from another and not allow the accomplice to corroborate herself in this way, and Judge Christiancy admitted that "It is true the considerations already stated do not apply to her testimony with the same force as that of other witnesses, but we think they fully justify the propriety of testimony by other witnesses," and he said: "There is no ground upon which an accomplice can be excluded from testifying to any facts to which any other witness may testify." Then the judge goes on to argue that where the defendant is in no danger of being convicted for the prior offenses, because they were barred by the statute of limitations, they could be shown, as a means of making appear more probable what she testified about the offense charged.

In *State v. Kemp*, 87 N. C. 538, the anterior acts would seem to be only those which are protected by the statute of limitations. *Com. v. Bell*, 166 Pa. 406, 31 Atl. 123, seems to regard the principle of prior acts being admissible as having an extension in their inclusion of the acts so barred. Judge Christiancy argues, and the North Carolina seems to go proceed, that they may be admissible while those within the statutory period might not be. It rather seems Judge Christiancy takes the juster view.

The Clifton case merely goes on the theory that rape and incest are distinguishable from adultery, as each act constitutes a separate offense and prior acts "in no way tend to develop the *res gestae*, show intent, or connect the defendant with the case on trial."

In *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972, an incest case was ruled as coming under the general rule as to sexual crimes, viz., that prior and subsequent acts show the relation and mutual disposition of parties. But why should this rule apply to incest, in which "mutual disposition" is a mere incident, while it is of the essence in a case of adultery?

We have examined a great many cases and find none squarely supporting the principal case, except that some say proof of subsequent acts is inadmissible, but at the same time it looks like the exception to the rule has been made too broad. It does not appear that an accomplice

should thus be allowed to corroborate herself. If it is testimony, instead of evidence, that needs corroboration, a perjured witness may be left free to appeal to her imagination and inventive faculty for all the corroboration she needs. C.

JETSAM AND FLOTSAM.

INCREASE OF SALARIES OF FEDERAL JUDGES.

To the Members of the Bar.

A bill has been introduced in Congress by Representative Moon of Pennsylvania increasing the federal judges' salaries as follows: Chief Justice Supreme Court... \$13,000 to \$18,000 Associate Justices 12,000 to 17,500 Circuit Judges 7,000 to 10,000 District Judges 6,000 to 9,000

The increase asked for one hundred and twenty-four judges, carries an additional annual appropriation of only \$384,000.

You are requested to give this measure your support and to immediately express to your senators and representatives your views upon this subject.

John C. Spooner, Chairman,
Charles E. Littelfield,
Henry W. Taft,
Charles C. Burlingham,
Robert C. Morris,
Earl D. Babst,
William V. Rowe,
John W. Griggs,
Abram I. Elkus,
Lindsay Russell,
Eugene C. Worden, Cor.
Sec'y, 165 Broadway,
New York,

Committee on Federal Judges' Salaries.
New York, March 25, 1910.

[We received the above communication from Mr. Eugene C. Worden, corresponding secretary of a Committee on Federal Judges' Salaries.

We do not know who originated or constructed this committee, but we are in hearty sympathy with their propaganda on one condition.

That one condition is the abolishment of life tenure for district and circuit judges, and providing in lieu thereof a term of ten years.

We are ready to admit that our convictions on this question have only recently become fixed.

We have reasoned as often as anybody in favor of life tenure, on the ground that it produces better judges.

Our views have changed.

First, because life tenure, while it secures independence of political influence, frequently promotes disregard of proper criticism.

Second.—It keeps on a bench men who become subsequently unfit for service.

Third.—The method of removal, to-wit, by impeachment, is often an impossible remedy, no lawyer desiring to become a prosecuting witness.

Fourth.—Because it has aroused a suspicion of unloyalty to the people's interest and thus impaired public confidence.

Fifth.—Because it has promoted an insolent disrespect of state sovereignty, and thus antagonized state courts and legislatures, producing unnecessary ruptures.

Sixth.—Because it is not necessary for the election or selection of the best men in the profession.

We are not now advising a change in the methods of selection. It might be wise to still leave the appointment with the president, with the opportunity on the part of the senate, the people's representative, to reject a judicial nominee thus appointed every ten years.

With the abolition of life tenure, we will go heartily along with everybody in favor of a large increase of salary for the federal judiciary.

Our remarks have no reference to the Supreme Court, but only to the lower federal courts.

Abolish the life tenure.—Editor.]

BOOK REVIEWS.

ESTATE ACCOUNTING.

This book is the product of a collaboration between Frederick K. Baugh, expert accountant, and William C. Schmeisser, A. B. LL. B., of the Baltimore bar.

Its purpose is to give estate accountants the general legal principles upon which estate accounting is based, and to show their practical application. The principal authorities used are Schouler's Treatises on Executors and Administrators and Wills, and Loring on a Trustee's Handbook.

The plan is well brought out, and the theory that should control in estate accounting is clearly explained and illustrations and forms of its application are given, in logical and chronological sequence, so that executors and administrators may both administer their trust properly and cause the evidence thereof properly to appear.

The volume is in law buckram, of typographical excellence, contains, with index, over 300 pages and published by M. Curlander, Law Bookseller, etc., Baltimore, Md., 1910.

AMERICAN STATE REPORTS, VOL. 129.

This volume shows that this publication is fully up to the standard Mr. A. C. Freeman has set in legal literature.

There are many monographs in the volume, presumably from the pen of Mr. Freeman. A very extensive one is on the right of an accused to confrontation and its invasion. Another is Equitable Jurisdiction to Construe a Will. Another, Constitutional Limitations on Power to Impose License on Occupation Taxes. Still another refers to Dedication to and Acceptance of a Public Street. There are still others, and the usual references at end of cases showing prior treatment of what is ruled on the selected cases this volume contains.

Published by Bancroft-Whitney Company, San Francisco, Cal.

BOOKS RECEIVED.

The Principles of Argument. By Edwin Bell, LL.B. Toronto: Canada Law Book Company, Limited. Philadelphia: Cromarty Law Book Company. 1910. Review will follow.

American Electrical Cases (Cited Am. Electr. Cas.). Being a collection of all the important cases (excepting patent cases) decided in the state and federal courts of the United States from 1873, on subjects relating to the telegraph, the telephone, electric light and power, electrical railway, and all other practical uses of electricity. With annotations. Edited by Austin B. Griffin, of Albany, N. Y., bar. Vol. IX., 1904-1908. Albany, N. Y. Matthew Bender & Company. 1910. Review will follow.

HUMOR OF THE LAW.

He was a little German man, and as he boarded the car he had such a happy smile on his face that the smoker on the platform asked:

"Well, Jacob, is this a Happy New Year's for you?"

"She vhas so happy dot maype I bust myself oop!" was the reply.

"Something good has happened, eh?"

"Der best effor. Schmidt und I vhas partners from to-day."

"Let's see? Schmidt is in the ice business, I believe?"

"He vhas."

"And you have been working for him?"

"Shust so."

"And to-day—?"

"Und to-day we vhas partners. I vhas tooken in. Schmidt he handles all der money und I handles all der ice. By golly but I vhas a happy mon!"

The presence in Washington last week of former Senator William A. Clark of Montana recalled to the mind of some Westerners a story of his aversion to large tips, although he's one of the wealthiest men in the country.

One of the Senator's sons, when in Butte, always went to a certain well-known barber shop and always procured the services of a particular barber, to whom he frequently gave a tip amounting to \$5.

The Senator himself went into this shop one day, jumped into the chair of his son's favorite tonsorial trifler, and after going through several degrees of bartering, gave the man a 25-cent gratuity.

"Your son gives me \$5 every time he comes here," remarked the barber casually.

"Yes," replied the Senator, "but he has a rich father. I haven't."

"The recent press reports touching the use of whisky by juries in Tennessee," says a New York lawyer, telling twice-told tales, "reminds me of an amusing incident in connection with a trial I once witnessed in Arkansas.

"The defendant had been accused of selling adulterated liquor, and some whisky was offered in evidence. This was given the jury as evidence to assist in its deliberations.

"When they finally filed into court, His Honor asked:

"Has the jury agreed on a verdict?"

"No, your Honor," responded the foreman, "and before we do, we should like to have more evidence."

WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
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1. Abortion—Accomplice.—To "advise" and "procure" a pregnant woman to use an instrument with intent to cause her miscarriage, held to be a use thereof.—Greenwood v. State, Okl., 105 Pac. 371.

2. Accident Insurance—Waiver of Right to Proofs of Loss.—Where an accident insurance company denied its liability on a policy before the time for filing proof of loss had expired, they thereby waived their right to proof of loss.—Mellen v. United States Health and Accident Ins. Co., Vt., 75 Atl. 273.

3. Adoption—Validity.—A decree of adoption by a wife of her husband's child by a former wife may be set aside for undue influence exerted by the husband, at the suit of the wife's heirs, after the death of both the wife and the child.—Phillips v. Chase, Mass., 89 N. E. 1049.

4. Adultery—Persons Entitled to Prosecute.—The obtaining of a divorce by the wife of an accused charged with adultery held not to deprive the court of the power to try him under Wilson's Rev. & Ann. St. 1903, sec. 2264, requiring the prosecution to be carried on against the husband by his wife.—Ex parte Cranford, Okl., 105 Pac. 367.

5. Adverse Possession—Admission of Title in Another.—An occupant of land, admitting in writing that it belongs to another, voluntarily submits to the other's title and surrenders any right acquired by prior possession.—Dill v. Westbrook, Pa., 75 Atl. 252.

6. Agriculture—Negligence at Fairs.—A boy, present at a fair at the invitation of a company running the fair, is entitled to the exercise of ordinary care on the part of the company to protect him against dangerous agencies, known by it to exist and permitted on its grounds, set apart for the use of the public.—Plasket v. Ben-

ton-Warren Agricultural Society, Ind., 89 N. E. 968.

7. Animals—Police Power.—The legislature, in the exercise of its police power, may provide for the summary destruction of dogs without judicial proceedings.—McDermot v. Taft, Vt., 75 Atl. 276.

8. Appeal and Error—Abstract of Record.—An abstract of record is fatally defective where it does not contain a copy of the judgment, notice of appeal, proof of service thereof, or the undertaking on appeal, as required by B. & C. Comp., sec. 553.—Burchell v. A. H. Averill Machinery Co., Or., 105 Pac. 403.

9. Bill of Exceptions.—Where, in a bill of exceptions, error is assigned upon the overruling of a demurrer and upon matters depending upon the evidence, and because of defects in record the latter assignment cannot be considered, the bill presents for consideration only the ruling on the demurrer.—Davis v. Smith, Ga., 66 S. E. 401.

10. Arrest—Bench Warrant.—The declaration of Bill of Rights, sec. 30, that no warrant shall issue but upon probable cause, supported by oath, describing the person to be seized, held without application to a bench warrant issued upon an information filed pursuant to the finding of an examining magistrate.—Ex parte Cranford, Okl., 105 Pac. 367.

11. Assignments—Fund Due Sub-Contractor.—An accepted order given by the sub-contractor to a materialman held to operate as an assignment pro tanto of the contract price, subject only to the condition that the contract should be performed.—Hall v. Jones, N. C., 66 S. E. 350.

12. Order Payable Out of Particular Fund.—The payee of an order payable in chattels or out of a particular fund, if he fails to receive the property, cannot sue the drawer on the order, but on the original consideration.—Maynard v. Maynard, Me., 75 Atl. 299.

13. Audita Querela—Execution.—If a final judgment against defendant was merged into a judgment subsequently obtained by plaintiff on scire facias against defendant's debtors factorized into the action, defendant's remedy to prevent the enforcement of the judgment was by a proceeding in the nature of an equitable action or of audita querela.—Russell Lumber Co. v. J. E. Smith & Co., Conn., 74 Atl. 949.

14. Bail—Personal Cash Deposit of Defendant.—Where cash is deposited as bail by defendant in criminal proceedings, and the payment is unauthorized by law, it is considered a personal deposit of defendant and can only be recovered by him or by his creditors.—Doane v. Dalrymple, N. J., 74 Atl. 964.

15. Bailment — Pleadings.—Where issue whether warehouseman used common prudence is raised, proof of conditions putting him under the duty of exercising greater care held admissible.—Netzow Mfg. Co. v. Southern Ry. Co., Ga., 66 S. E. 399.

16. Bankruptcy—Avoidance by Trustee.—Where, after adjudication of bankruptcy, attempt is made by an existing creditor, by means of court process, to obtain an advantage within the United States, or secure a preferential lien, the same will be avoided on timely and proper application by the trustees.—Ward v. Hargett, N. C., 66 S. E. 340.

17. Effect of Discharge.—A discharge in bankruptcy extinguishes a pre-existing debt, and is not merely a bar to the remedy thereof.—Needham v. Mathewson, Kan., 105 Pac. 436.

18. Banks and Banking—Action to Recover Deposit.—In an action against a bank to recover an alleged deposit claimed by defendant to have been private loans to the cashier, nature of the transaction held for the jury.—*Greenhalgh Co. v. Farmers' Nat. Bank, Pa.*, 75 Atl. 260.

19.—Fraudulent Insolvency.—Mere mismanagement resulting in the insolvency of a bank held not punishable, but insolvency indicating intentional fraud or dishonesty is.—*Youmans v. State, Ga.*, 66 S. E. 383.

20.—Knowledge of Directors.—Where the principal directors of a bank are directors of a corporation whose property is heavily mortgaged to it, it should be held to have notice that fixtures of considerable value covered by the mortgage were not paid for, and were bought under a conditional sale contract.—*State Bank of Williamson v. Fish*, 120 N. Y. Supp. 365.

21. Benefit Societies—Non-Payment of Assessment.—A beneficiary does not have such a vested interest as to entitle him to pay a past-due assessment without a member's consent.—*Proctor v. United Order of the Golden Star, Mass.*, 89 N. E. 1042.

22. Bills and Notes—Forged Check.—Where a drawee of a forged check pays it to a bona fide holder, who is without fault, he cannot recover the money from such holder.—*Bank of Williamson v. McDowell County Bank, W. Va.*, 66 S. E. 761.

23. Burglary—Ownership.—A carrier has such an interest in goods while in its custody for transportation as will support an allegation of ownership in an indictment for burglary.—*Hall v. State, Ga.*, 66 S. E. 390.

24. Carriers—Action for Loss of Freight.—In an action against a carrier for loss of goods, the freight having been paid by the consignor, the measure of damage was the value of the goods at the point of shipment plus the freight.—*De Schamps v. Atlantic Coast Line Ry. Co., S. C.*, 66 S. E. 414.

25.—Ejection of Passengers.—A carrier is liable for the ejection a passenger who is on the wrong train by the erroneous instructions of its ticket agent, though the ejection was without rudeness or malice.—*Mace v. Southern Ry. Co., N. C.*, 66 S. E. 342.

26.—Injury to Goods.—In an action for damages to goods carried against the last of a succession of connecting carriers, the last carrier is liable, though part of the damages occurred on the line of a preceding carrier.—*Goffroth v. Bangor & A. R. Co., Me.*, 74 Atl. 918.

27.—Injury to Licensee.—A person injured while riding on a freight train not being a passenger, even if a licensee, cannot avail himself of a presumption of negligence from the mere fact of a collision.—*Bergan v. Central Vermont Ry. Co., Conn.*, 74 Atl. 937.

28.—Injury to Live Stock Shipment.—The delivery by a carrier in bad condition of live stock received in good condition warrants, in the absence of explanation, an inference of negligent handling, but not of a wanton or willful breach of duty.—*Mayfield v. Southern Ry. Co., S. C.*, 66 S. E. 406.

29.—Injury to Passenger on Scenic Railway.—In an action for injuries by being thrown from a scenic railway, testimony for plaintiff tending to show that the injury was caused by apparatus wholly under defendant's control while plaintiff was using due care held to raise a

prima facie presumption of negligence.—*O'Cal laghan v. Dellwood Park Co., Ill.*, 89 N. E. 1045

30.—Loss by Public Enemy.—The terms "public enemy" under the rule that a carrier is liable for the loss of goods except by act of God, or the public enemy, means enemy of the country, and does not include moba.—*Pittsburg, C. C. & St. L. Ry. Co. v. City of Chicago, Ill.*, 89 N. E. 1022.

31.—Misdescription of Goods Shipped.—Where a shipper of cigars without fraud or negligence which misled the carrier shipped them as smoking tobacco for a less rate, he was not thereby precluded from recovering the value of the cigars and the freight paid in case of loss.—*Jenkins v. Atlantic Coast Line R. Co., S. C.*, 66 S. E. 407.

32. Charities—Business Transactions.—The power of a religious, missionary, educational, and charitable corporation to take and sell real estate is purely incidental in the prosecution of its main purpose.—*General Conference of Free Baptists v. Berkey, Cal.*, 105 Pac. 411.

33. Conspiracy—Civil Liability.—Where two or more persons conspire to do a lawful act in a lawful manner, from which damages flow, the malicious motives and the conspiracy do not give rise to a cause of action which would not otherwise exist.—*Cohen v. Nathaniel Fisher & Co.*, 120 N. Y. Supp. 546.

34. Conspiracy—Prior Advertising.—In a contract for the construction of floors of certain material, the advertising matter sent by plaintiff to defendant some months before the contract, in relation to the material, held not a part of the contract.—*Asbestolith Mfg. Co. v. Howland*, 120 N. Y. Supp. 93.

35. Convicts—Corporal Punishment.—Corporal punishment, administered to convicts by a warden or other officer under circumstances not authorized by law, amounts to an assault.—*Westbrook v. State, Ga.*, 66 S. E. 788.

36. Corporations—Contracts.—Minutes of proceedings of a corporation are not binding on one seeking to enforce against it a contract claimed to have been made in its behalf, not shown thereon, and a corporation could not vitiate a contract by failing to have it noted.—*Farjeon v. Indian Territory Illuminating Oil Co.*, 120 N. Y. Supp. 298.

37.—Doing Business in Foreign State.—A single sale of real estate of a foreign religious, missionary, educational or charitable corporation held not a transaction of business within Const. art. 12, sec. 15, so that the failure to comply with Clv. Code, sec. 598, did not render the sale invalid.—*General Conference of Free Baptists v. Berkey, Cal.*, 105 Pac. 411.

38.—Names.—The use of a society's corporate name by another held to be an infringement, constituting ground for injunction.—*Salvation Army in United States v. American Salvation Army*, 120 N. Y. Supp. 471.

39.—Purchase of Stock.—A corporation to which money was paid for stock and directors whose false representations induced its purchase and payment of money to the corporation can be joined in one action to rescind the purchase, and recover back the money paid.—*Lehman-Charley v. Bartlett*, 120 N. Y. Supp. 501.

40. Costs—Parties Liable.—Where the court decrees that plaintiff take nothing, and that the appointment of a receiver was wrongful, it was not error to tax plaintiff with costs of

the receivership.—*Bellamy v. Washita Valley Telephone Co.*, Okl., 105 Pac. 340.

41. **Covenants—Construction.**—It being no longer lawful to levy a tax on interest on corporate bonds, a covenant by a railroad company to pay taxes on its mortgages, or the bonds secured thereby, or the income thereon, cannot be held applicable to such a tax.—*Musgrave v. Baltimore & O. R. Co.*, Md., 75 Atl. 245.

42. **Criminal Evidence**—Construction.—It is not necessary to sustain a conviction that evidence should show the guilt of defendant beyond the possibility of a doubt, but only beyond a reasonable doubt.—*State v. Draughn*, Mo., 124 S. W. 20.

43. **Criminal Law—Judicial Notice.**—Judicial notice will be taken that prior to statehood, November 16, 1907, there was no such county as Pontotoc in Oklahoma.—*Rea v. State*, Okl., 105 Pac. 386.

44. **Criminal Trial—False Pretenses.**—An information under Penal Code, sec. 746a, charging defendant with drawing a check with intent to defraud "Lesser Bros. Co., a corporation," while the check was payable to "Lesser Bros. Co.," held sufficiently definite to show what was intended to be charged.—*People v. Russell*, Cal., 105 Pac. 416.

45. **Fixing Punishment.**—Where the jury illegally fixes the punishment, and the court in passing sentence assesses the punishment fixed by the jury, the verdict will not be set aside unless the punishment fixed is excessive.—*Baker v. State*, Okl., 105 Pac. 379.

46. **Instructions.**—Remarks of the court regarding Pub. Acts 1907, p. 825, c. 221, sec. 12, when construed with other charges, held not objectionable as authorizing the jury to find the accused guilty of manslaughter if they found that he did not reduce the speed of his automobile when he passed deceased.—*State v. Campbell*, Conn., 74 Atl. 927.

47. **Death—Action for Negligent Death.**—Where, in an action for death, the evidence showed that the death was caused by the negligence of defendant, a recovery could be had, though the negligence was not wanton or willful as alleged in the declaration.—*Guilanios v. De Camp Coal Mining Co.*, Ill., 89 N. E. 1003.

48. **Descent and Distribution—Sale of Land.**—Where a judicial sale of land, descended to heirs, is made to satisfy a lien on it and purchased by the lien owner and is thereafter set aside for fraud, the lien held not thereby extinguished.—*Harvey v. Nutter*, W. Va., 66 S. E. 363.

49. **Disturbance of Public Assemblage—Construction of Statute.**—Revised 1905, sec. 3706, held to protect regularly established places of public worship, but not an exceptional meeting, consisting of a family reunion, meeting from time to time at the homes of the members of the family, but such meeting is within section 3704.—*State v. Starnes*, N. C., 66 S. E. 347.

50. **Drains—Two-thirds Remonstrance.**—In computing whether two-thirds in number of landowners named in a petition for a drain or who may be affected by any assessment or damages have signed a remonstrance provided by Drainage Act 1907, sec. 3 (Burns' Ann. St. 1908, sec. 6142), all resident owners of land named in the petition and resident owners of land at the time of filing the remonstrance must be counted.—*Thorn v. Silver*, Ind., 89 N. E. 943.

51. **Evidence—Judicial Notice.**—It is a matter of common knowledge that there is no strictly transcontinental, line of railroad in the United States operated by a single company, though one may procure a ticket from one seaboard to the other, traveling over connecting lines of railroad.—*Brian v. Oregon Short Line R. Co.*, Mont., 105 Pac. 489.

52. **Executors and Administrators—Establishment of Claims.**—Where one promises to pay another by will for services rendered, but died without making a will, and the services were performed pursuant to the agreement, there could be a recovery for the value thereof, not exceeding the amount which claimant should have received by will.—*Appeal of Hull*, Conn., 74 Atl. 925.

53. **Food—Sale of Condemned Meat.**—A sale of meat for food after it had been inspected by a local board of health inspector, as authorized by Rev. Laws 1902, c. 75, sec. 102, and St. 1903, p. 119, c. 220, held not illegal, though a state board of health inspector condemned the meat.—*Commonwealth v. Prince*, Mass., 89 N. E. 1047.

54. **Fraud—Grounds of Action.**—The purchaser of corporation securities held not entitled to maintain an action for fraud on the grounds of overcapitalization of the corporation.—*Lane v. Fenn*, 120 N. Y. Supp. 237.

55. **Gaming—Common Law.**—Under Penal Code, sec. 351, a person making oral bets on a horse race held not a bookmaker.—*People v. Langan*, N. Y., 89 N. E. 921.

56. **Executors and Administrators.**—A transaction between an executor and a stockbroker, whereby funds of the estate are turned over to the latter for the purpose of speculating in stocks though both parties are in good faith, is an unlawful investment, and may be recovered back by the estate.—*Steele v. Leopold*, 120 N. Y. Supp. 569.

57. **Money Placed in Another's Hands.**—Where a person places money in the hands of another to be used for gaming and recalls it before it is used, the party in whose hands the money is must repay it.—*Kohler v. Rosenthal*, 120 N. Y. Supp. 325.

58. **Homicide—Justifiable Homicide.**—Under Pen. Code 1895, sec. 70, held that a person is not justified in killing another, attempting without provocation to commit a felony on him, unless necessary to prevent the commission of the crime, or the circumstances would excite the fears of a reasonable man.—*Lyens v. State*, Ga., 66 S. E. 792.

59. **Premeditation and Deliberation.**—While, under the statute, to constitute murder in the first degree premeditation and deliberation must precede the act of killing, no particular lapse of time need occur between the two; it being enough that sufficient time elapses for the jury to find as a matter of fact that premeditation and deliberation did exist.—*People v. Jackson*, N. Y., 89 N. E. 924.

60. **Husband and Wife—Earnings of Husband.**—Delivery of a husband's earnings to the wife who acted as treasurer of the family held not to justify a presumption of gift to her.—*Beck v. Beck*, N. J., 75 Atl. 228.

61. **Fraudulent Representations of Husband.**—Where a farm sold by a husband and wife was not the wife's separate estate, her responsibility for false representations, made in respect thereof by the husband, is to be measured by the common law, and not by P. S.

3037, enlarging the powers of married women.—*Rowley v. Shepardson*, Vt., 74 Atl. 1002.

62. **Habeas Corpus**—Custody of Child.—In habeas corpus a child held under the circumstances of the case, to properly be left in the custody of foster parents, rather than in that of his mother.—*Ex parte Fields*, Wash., 105 Pac. 466.

63.—**Judgment Without Evidence to Support**.—A judgment, though founded on no evidence, is not void, so as to be subject to attack by habeas corpus, where defendant has actually or constructively had his day in court.—*Davis v. Smith*, Ga., 66 S. E. 401.

64. **Insane Persons**—Proceedings to Sell Land.—Where a court orders a lunatic's committee to sell lands, and authorizes him to apply to the court in another county for an order to sell land therein, the record must show that the lunatic's widow and heirs were served with notice of the proceedings.—*Patchin v. Seward Coal Co.*, Pa., 75 Atl. 250.

65. **Intoxicating Liquors**—Illegal Sale.—Where the information charges a liquor nuisance to have been maintained in a building on a specifically described tract of land, it is error to admit evidence that it was maintained at a place outside of said tract.—*State v. O'Neal*, N. D. 124 N. W. 68.

66. **Jury**—Competency of Juror.—A juror, whose wife was related within the fourth degree to persons who had contributed to a fund for the employment of counsel to prosecute the case, and were hence voluntary prosecutors, was not competent to sit on the jury.—*Lyens v. State*, Ga., 66 S. E. 792.

67. **Judgment**—Conformity to Pleadings.—Plaintiff, having pleaded a cause of action on the theory of defendant's liability on an express promise to pay the debt of a corporation, could not recover on the theory that defendant was a partner.—*Yracheta v. Stafford*, 120 N. Y. Supp. 117.

68.—Contempt.—Order as to custody of children held within protection of federal constitution, declaring that full faith and credit shall be given to judicial proceedings of other states.—*Dixon v. Dixon*, N. J., 74 Atl. 995.

69.—Equitable Relief.—Where property was sold after judgment by default in a mechanic's lien proceeding, held that the owner of the property, failing to receive process without his own fault, could compel a reconveyance or have the lien proceeding opened.—*Mierke v. Sebecke*, N. J., 74 Atl. 977.

70. **Judicial Sales**—Title of Purchaser.—The legal title does not vest in the purchaser at a judicial sale until the delivery of the deed, and in the meantime the property is held in trust for him and the beneficial ownership of the property is vested in him, so that any increase or decrease in value inures to him.—*Cropper v. Brown*, N. J., 74 Atl. 987.

71. **Landlord and Tenant**—Holding Over Under Lease.—Under a lease providing that the lessee had the right to renew for two years, that after the termination of the lease the lessee held over and paid monthly rents under the same terms as the old lease for eight months did not amount to a formal renewal of the lease, as required by its terms.—*Leavitt v. Mayell*, Mass., 89 N. E. 1056.

72.—Injuries to Third Person.—The only duty of lessees of a theater to a member of a

theatrical company performing therein was to use reasonable care to keep the building in reasonable repair; such person not being their employee.—*Mitcheltree v. Stair*, 120 N. Y. Supp. 540.

73.—Title to Grain.—No title is acquired by a landlord to grain raised by the tenant until the division and delivery thereof to him.—*Eaves v. Sheppard*, Idaho, 105 Pac. 407.

74. **Limitation of Actions**—Continuing Trespass.—Trespass from diversion of surface water held not a continuing trespass, within the statute of limitation.—*Roberts v. Baldwin*, N. C. 66 S. E. 346.

75. **Master and Servant**—Action for Wages.—Where, though plaintiff was employed by the month, he was to be paid only for the days he actually worked, held that he could not recover wages during his suspension.—*Southern Ry. Co. v. Everett*, Ga., 66 S. E. 398.

76.—Acts of Fellow Servants.—If an employee's injury resulted from the negligence of a fellow servant in not selecting a reasonably safe appliance, provided by the employer, or by such fellow servant's negligence in subjecting a proper appliance to a strain not reasonably to be anticipated, the employer would not be liable therefor, in absence of statute.—*Mulligan v. McDonald*, 120 N. Y. Supp. 522.

77.—Contributory Negligence.—An employee who voluntarily places himself in a dangerous position, where he was not required to be in the performance of his work, cannot recover for injuries caused by such unsafe position.—*O'Hara v. O'Rourke Engineering Const. Co.*, 120 N. Y. Supp. 404.

78.—Knowledge of Defects.—A street railway company is not liable for injuries to its motorman from defects in the track of another company, over which he operated the car on the part of the route, in the absence of knowledge of such defects.—*Powell v. Cohoes Ry. Co.*, 120 N. Y. Supp. 336.

79.—Negligence.—A driver held not negligent as matter of law in suddenly bringing his horse to a stop on a level street upon discovering that the trace was unhitched.—*Lundergan v. Graustein & Co.*, Mass., 89 N. E. 1034.

80. **Monopolies**—Combinations.—A corporation acquiring control of other corporations and making use of contracts acquired by them held liable for violating the anti-monopoly act (Consol. Laws, c. 20, secs. 340-346).—*People v. American Ice Co.*, 120 N. Y. Supp. 443.

81. **Mortgages**—Agreement to Insure.—Payment of premium for insurance by the mortgagor to the mortgagee held not a sufficient consideration for the mortgagee's promise to take out the insurance which was nudum pactum, unless a part of the mortgage transaction.—*Hudson v. Elleworth*, Wash., 105 Pac. 463.

82. **Municipal Corporations**—Regulating Speed of Automobiles.—The state under its police power may regulate the speed of automobiles, and enact other reasonable rules as to their use upon highways.—*State v. Mayo*, Me., 75 Atl. 295.

83.—Use of Streets.—Where an ambulance driver drove on the wrong side of the way under an apparent claim of right, and kept it in making a turn, it was an abuse of his rights.—*Kellogg v. Church Charity Foundation of Long Island*, 120 N. Y. Supp. 406.

84. **Negligence**—Children.—Whether a boy is guilty of contributory negligence must be measured by the care to be expected of a boy of his age and environment at the time of the accident.—*Ritscher v. Orange & P. V. Ry. Co.*, N. J., 75 Atl. 209.

85.—Dangerous Premises.—An owner held liable to one injured by the fall of a fire escape, on which he had stepped to make an examination for the purpose of making an estimate, at the request of the owner, of the cost of taking it down.—*Grill v. Gutfreund*, 120 N. Y. Supp. 86.

86. **Partnership**—Death of Partner.—The interest of a deceased partner held properly chargeable with a proportionate part of an amount carried in the partnership's suspense account as representing the excess of liabilities

over assets.—*Shearman v. Cameron*, N. J., 74 Atl. 979.

87. **Physicians and Surgeons**—Liability for Malpractice.—Where the evidence shows that the tubercular disease of plaintiff's hip joint had progressed so as to be incurable before defendant undertook its treatment, defendant cannot be held liable for failure to effect a cure.—*Lubbe v. Hilgert*, 120 N. Y. Supp. 387.

88. **Principal and Agent**—Payment of Checks.—Where the agent had authority to indorse and cash a check given him for his principal, the bank on which it was drawn is not liable to the principal on the agent's subsequent misappropriation of the money.—*Porges v. United States Mortgage & Trust Co.*, 120 N. Y. Supp. 487.

89. **Principal and Surety**—Persons Bound.—Plaintiff, who merely signed a contract under a statement that it thereby consented to the contract which was in terms between defendant and certain corporations who signed it, held not bound as surety for the performance by such corporations of their obligations under the contract.—*Henry O. Shepard Co. v. Freeman*, Mont., 105 Pac. 484.

90. **Railroads**—Conditions Contained in Tickets.—A coupon ticket issued by an initial carrier as agent for subsequent carriers held not to entitle the passenger to carriage over the last line after the time limited for transportation to destination had expired, though prevented from presenting his ticket within the time limited by the fault of the other carriers.—*Brain v. Oregon Short Line R. Co.*, Mont., 105 Pac. 489.

91. **Fires**.—Under P. S. 4510, if a fire along a railroad right-of-way is caused by sparks from the locomotive, the burden is on the company to prove that it employed the best spark arresters in use, and exercised due care in managing the engine.—*Huntley v. Rutland R. Co.*, Vt., 74 Atl. 1000.

92. **Injury to Animals on Track**.—Railroad held not required to check train when an animal is seen near the track, except in certain cases.—*Augusta Southern R. Co. v. Carroll*, Ga., 66 S. E. 403.

93. **References**—Nature of Office of Auditor.—An auditor is an officer of the court, whose duty is to present to the court the contentions of parties and his rulings and conclusions thereon.—*Hale v. Owensby*, Ga., 66 S. E. 781.

94. **Searches and Seizures**—Concealed Weapons.—Defendant held not within the constitutional guaranty against an unlawful search and seizure of his person, so as to make evidence of the fact that he was carrying a weapon inadmissible.—*Brookins v. State*, Ga., 66 S. E. 398.

95. **Specific Performance**—Defenses.—Specific performance of a contract for the sale of land cannot be defeated by the drafting of a substituted contract according to the verbal agreement of the parties, but which was never executed.—*Bourke v. Kissack*, Ill., 89 N. E. 990.

96. **States**—Crimes Committed Before Statehood.—Where defendants were indicted in the district court, after statehood, for a crime committed prior thereto, and the prosecution was transferred to the county court, held that it had jurisdiction.—*Baker v. State*, Okl., 105 Pac. 379.

97. **Street Railroads**—Contributory Negligence of Child.—A boy 8 1/2 years of age, paying tag near a street railway track, is not, as a matter of law, guilty of contributory negligence in failing to avoid an approaching car.—*McFarland v. Elmira Water, Light & R. Co.*, 120 N. Y. Supp. 292.

98. **Gross Earnings Tax**.—Where a street railroad subject to a gross earnings tax for a township connected with other lines transported passengers for a single fare, the gross earnings should be prorated in accordance with the mileage in determining the amount of the tax.—*Asbury Park & S. G. R. Co. v. Neptune Tp.*, N. J., 74 Atl. 998.

99. **Riding on Running-Board**.—A person riding on the running-board of a street car, recognized as a passenger by collection of his fare, held not, as a matter of law, negligent, if subsequently injured through the carrier's carelessness.—*Eldredge v. Boston Elevated Ry. Co.*, Mass., 89 N. E. 1041.

100. **Subrogation**—Outstanding Lien.—A grantee under warranty deed may purchase outstanding liens against the land, and be subrogated to the rights of the lienholders.—*Maitlen v. Maitlen*, Ind., 89 N. E. 966.

101. **Sunday**—Work of Necessity.—Pen. Code 1895, sec. 420, making it a misdemeanor to run freight or excursion trains on Sunday, excepting mail or passenger trains, held a legislative construction that the running of those trains is within the exception of section 422, forbidding other than works of necessity or charity on Sunday.—*Southern Ry. Co. v. Wallis*, Ga., 66 S. E. 370.

102. **Taxation**—Franchise Tax.—In determining the value of tangible corporate property by the net earnings rule, where the property is practically indestructible by use or is nearly new, the cost of reproduction indicates its value.—*People v. State Board of Tax Com'rs*, 120 N. Y. Supp. 528.

103. **Informal Entry**.—An informal entry of an increase of valuation of property by the county commissioners held the act of the board of equalization.—*Holton Electric Co. v. Board of Com'rs of Jackson County*, Kan., 105 Pac. 453.

104. **Inheritance Tax**.—Under the inheritance tax law (Hurd's Rev. St. 1908, c. 120, secs. 366-388), a sum which the devisees paid out of the estate to a disinherited heir in consideration of her agreement not to contest the will held taxable to the residuary legatees.—*In re Graves' Estate*, Ill., 89 N. E. 978.

105. **Mortgages**.—Mortgages of land in this state owned and held by non-residents as well as residents, may rightfully be assessed where the land is situated.—*Musgrove v. Baltimore & O. R. Co.*, Md., 75 Atl. 245.

106. **Oil and Gas**.—Where separate assessment is not made against oil and gas, severed in title from land, a sale of the land for taxes held to carry the oil and gas.—*Wellman v. Hoge*, W. Va., 66 S. E. 357.

107. **Vendor and Purchaser**—Construction of Contract.—A bond conditioned on the obligor maintaining his weak-minded brother held to bind the obligor to supply the reasonable needs of the latter.—*Rhyne v. Rhyne*, N. C., 66 S. E. 348.

108. **Forfeiture**.—A purchaser held not entitled to recover the cash payments made, on it appearing that the vendor tendered performance before any claim of forfeiture by the purchaser.—*Price v. Leo, Wash.*, 105 Pac. 469.

109. **Option Contracts**.—Where an option is without consideration, the owner may revoke it before the expiration of the time limit, if an acceptance has not been communicated to the owner.—*Canty v. Brown*, Cal., 105 Pac. 428.

110. **Waters and Water Courses**—Irrigation.—The beneficial use and the needs of the appropriators of water for irrigation, and not the capacity of the ditches, or quantity first run through them, is the measure and limit of the right of the appropriators.—*Whited v. Cavin*, Ore., 105 Pac. 396.

111. **Sale of Water**.—Where plaintiff notified defendant that he would demand a certain sum for every day the notice not to take water was violated, the subsequent taking of water was not an acceptance of a proposition to sell at a specified price.—*Wright v. Sonoma County*, Cal., 105 Pac. 409.

112. **Wills**—Agreements Between Legatees.—An agreement of all legatees under a will, except a daughter and another, conveying to testator's sons certain property, held not to bind the daughter.—*In re Hiscox*, 120 N. Y. Supp. 308.

113. **Election of Widow**.—When a widow elects to take her dower rights, being misled as to their nature, she may retract her election, when no rights acquired subsequently thereto will be injuriously affected by a retraction.—*In re McFarlin*, Del., 75 Atl. 281.

114. **Witnesses**—Impeachment.—An encyclopaedia article cannot be used to attack the reputation for truth and veracity of a gypsy witness.—*York v. State*, Tex., 123 S. W. 1112.

115. **Work and Labor**—Quantum Meruit.—Where a person bound himself to pay a specific sum for a week's work, and prevented the performance of the contract by the other party, the question of quantum meruit did not arise.—*Wheeler v. Woods*, 120 N. Y. Supp. 80.

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THE RIGHT OF FRATERNAL INSURANCE SOCIETIES TO CHANGE THEIR RATES.

A fraternal insurance association seems to be nothing more, under organizing statutes, than an aggregation of men each agreeing to bear at all times his proportionate burden in the carrying of indemnity on their respective lives. It is contemplated, at the beginning, that the proportion each survivor shall pay upon the death of one of their number shall be what he ought to pay according to life expectancy, and, therefore, any table of rates then or afterwards agreed upon is subject to what experience may demonstrate is required to maintain this equality.

This view appears to find recognition in many decisions in state and federal courts, but the Court of Appeals of New York has consistently rejected it, its latest expression on this subject being found in *Dowdall v. Supreme Council Catholic Mutual Ben. Ass'n*, 89 N. E. 1075.

This case shows that the single question was "presented whether by amendment of the constitution or any of the rules or regulations, made after the plaintiff had entered into his contract of insurance, it is possible for the defendant to change the rate of a single assessment from \$1.10 to \$5.56." This assumes the "defendant" changes the rate, and this is debatable. We say the members change the rate. The court then says: "There is a conflict of decisions in the various states on the question now presented, but a careful examination of the cases shows that the great weight of authority is in favor of the position that the original contract cannot be impaired." If

by this the court means that the weight of authority is that the original rate cannot be changed, we beg to think it greatly mistaken, and to express our belief that it misdescribes intent on the part of such courts as hold that the rate can be changed.

The conflict between the New York Court of Appeals, and the courts which differ with it lies in what is the differently understood meaning of "original contract," for we take it that all of these courts are in agreement that, whatever it is, it "shall not be impaired."

It is true that some of the cases give an enlarged meaning to what is said in application for insurance and in benefit certificates about agreeing to amendments to constitution and by-laws, which the New York court rejects, but all endeavor to ascertain what is the original contract and to enforce it.

We would be decidedly of the view the New York court adopts, that such a provision, found in the policy or benefit certificate of an insurance company in business for profit for its shareholders, would mean, that the agreement to pay a certain sum upon periodical payments or assessments of a fixed sum would remain such from the date of the policy or certificate to its becoming an absolute liability.

When, however, the organization is one that has no shareholders and issues no stock and its whole purpose is merely to keep books and collect and distribute funds, according to the will of members expressed in their legislative councils or assemblies, the feature of a contracting corporation is wholly eliminated. In this light, we construe agreements to abide by amendments to constitution and by-laws. There are no such things as boards of directors in these associations who can, in the ordinary sense of the word, contract for the corporation. They cannot even hire a clerk, of their own mo-

tion, if that amounts to the taking of one farthing from what members pay directly upon the burden that exists *inter se*. Nor can they forgive payment by any member. They can map out no policy for the organization, and the beginning and the end of their official duty is mere routine, the more strictly adhered to, the more faithfully performed.

The case of *Reynolds v. Supreme Council Royal Arcanum*, 192 Mass. 150, shows how Knowlton, C. J., speaking for the entire bench, regarded these contracts.

After stating that "the promise to pay the beneficiary is binding upon the corporation, and it ought to make adequate provision to obtain the means of payment," and the plan being as "mutuality without profit," the judge concludes that because a member wants the face of his certificate protected, he agrees in advance to secure its protection through this mutual obligation, as he knew when he obtained the insurance there was no other possible means of protection. The court thus speaks: "The assessments to be paid for death benefits are provided for by the by-laws, while a promise in writing to pay a certain sum * * * is a matter outside of corporate rules, which may be expected to be changed by an amendment of these by-laws. * * * The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly without mention of the by-laws. *The member occupies a dual position as an insurer and the insured.** As one of the association agreeing to provide the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum is promised he has a right to stand on the terms of his promise."

In effect Judge Knowlton makes failure to pay a rate, *prima facie* correct, whenever fixed, a condition precedent to keeping that policy alive. The promise of

the member to pay a proper rate is not a promise to the corporation, but a promise to members who thus mutually enable the corporation to make the proper payment. This reasoning gets around to the proper conclusion, but it seems faulty in taking any account of any promise by a corporation. There is in fact no such promise. The member's beneficiary becomes entitled to receive a certain sum because the constitution and by-laws so provide, and not because of any promise in writing by the corporation. If that alleged promise did not express what the by-laws provided, it would have no effect. A benefit certificate is largely a perfunctory document.

But the dual relationship clearly exists. And the aggregation of those who are both insurers and insured is a sort of democracy upon the principle of "equal rights to all and special privileges to none."

In so far as unforeseen exigencies, experience or lapse of time might prove that inequality between co-insurers has supervened, it seems to us clear, that equity could restate respective obligations, reducing some assessments and raising others. If this is true there ought not to be any question about their representative assemblies prescribing new rates. It is certain that, if the members voted unanimously to readjust rates, there would exist ample consideration to sustain any new promise thereunder. If their delegates are authorized to act, the same principle should control.

The New York court takes no account of the co-insurance feature, and why it should not be enforced in its integrity it is hard for us to imagine. Especially is this true, when it is clearly evident that, unless it is enforced; a corporation with no possible means of acquiring property of its own would not be able successfully to apply the provisions of by-laws which members have adopted. If courts would once entertain the idea, that these associations have virtually no corporate power, in the sense of a contractual capacity, the principle of a sort of partnership relation between members would secure its proper recognition.

**Italics are ours.*

NOTES OF IMPORTANT DECISIONS.

DIVORCE—REVIEW BY APPELLATE COURT OF TRIAL JUDGE'S FINDING OF FACTS, WHERE COLLUSION MAY BE INVOLVED.—A recent decision by the St. Louis Court of Appeals, has brought up the question as to whether there is a difference in an appellate court's consideration of the findings of fact by the trial judge in a divorce case, and any other case. Hamberg v. Hamberg (not yet reported).

The only claim there could be for any difference is that the trial judge denying a decree believed there was collusion. In every case due regard should be had for the superior opportunity of the trial court to judge of the credibility of witnesses. In an ordinary case, generally speaking, that consideration does not go beyond the preference of the trial judge where there is a conflict in testimony—unless, of course, testimony is unreasonable when intrinsic conflict may bring its rejection. But collusion induces perjury, and the manner of a party may create a very strong suspicion of its existence. The conduct of the other party in facilitating the obtaining of a divorce may be scrutinized very closely in this connection. Nevertheless a mere suspicion of collusion does not justify a finding of its existence, and there ought to be some rule forbidding a mere suspicion going beyond due bounds in the rejection of uncontradicted evidence. We have heard it said of some judges that divorces were more easily procured from them than others, and the personal characteristics and religious beliefs of judges have been discussed in this connection.

The Hamberg opinion seems to recognize, between its lines, that judges may possibly be subconsciously influenced by their personal views on this subject, for it speaks of courts having nothing to do with the policy of the law allowing divorces upon whatsoever ground the law prescribes. The learned court would not have uttered a platitude about the province of the legislature and the courts in respect of statutes unless it deemed its expression timely.

In this case the court thought the ground of desertion abundantly proven, both by the plaintiff and by the wife, who had been subpoenaed by direction of the court, and besides these there were other witnesses to the fact,

that the wife's absence had continued for more than three times the period required before the husband began his action. The case seemed to be one where collusion would have involved something like wholesale perjury, the only distinctive fact upon which there was disclosed a reason for collusion being, that both parties desired the divorce. In New Jersey it was ruled not evidence sufficient to show collusion for a defendant to go into a foreign jurisdiction so that service could be had on her, the real question being whether or not the matrimonial offense upon which divorce was sought gave a bona fide claim for a decree. Pohlman v. Pohlman, 60 N. J. Eq. 28. This holding was later approved. Griffith v. Griffith, 69 id. 689. The latter case, however, was one of collusion in that the facts showed the plaintiff brought the suit at the instigation of defendant and upon a bargain that he would pay her a lump sum upon the rendition of the decree. In English v. English, 19 Pa. Super. Ct. 586, an acceptance of service after it is too late to make a valid service, is held to be merely a circumstance for scrutiny. Bishop on Marriage and Divorce, sec. 253, says an agreement to "facilitate the proofs and smooth the asperities of the litigation" may not only be unobjectionable, but even meritorious, this merely being the subject of scrutiny.

This author also says: "To hold that the innocent party should be refused the remedy simply because the other desires it * * * would be in effect to allow a divorce when the defendant had gone a certain way in matrimonial wickedness, but to refuse it where he had taken another step." As successful marriage depends, so to speak, upon the correlated desire of each party, for when the yoke is intolerable to one, it can hardly be easy to the other. Nevertheless the law does not permit a mere agreement for dissolution to have its effect, but it is reasonably to be expected that willingness to enter into such agreement, not only removes any barrier against matrimonial offenses, but stimulates their commission.

But if utterance of the platitude of which we have spoken was timely, or thought by an able court to be timely, we may wonder whether there are judges who, for personal reasons or private convictions on the subject of divorce, are possessed of the belief that it is their duty to treat divorce cases brought upon legal grounds upon any distinctive principles, or that they have some duty or responsibility as to these cases from a moral standpoint. If such there are, it seems to us they are as much out of place as a well-meaning person could be. They are a sort of contra-

diction in terms—they swear to administer all law impartially, and they allow a personal bias to obtrude itself where it has no business to be. Such reformers can never be other than disappointments to themselves, for no man can impress upon another the excellence of his views by denying to that other what the law commands him to award, or not touch at all.

STARE DECISIS—STATUTE PROHIBITING REVERSALS OF FORMER DECISIONS.—Under the Georgia Civil Code 1895, sec. 5588, and Acts 1896, page 42, sec. 5, it is provided that when a decision is concurred in by six justices of the Supreme Court, it can only be reversed by the concurrence of all six. The construction placed upon these statutory provisions seems to be that prior decisions so concurred in—that is to say, the point ruled therein—can only be thus reversed. *Loeb v. Jennings*, 67 S. E. 101.

The Georgia court announces its decisions in syllabi, and in the above case there was an individual opinion. In that opinion the statutory provisions are referred to, and it is stated that: "Under this rule we must decline to reverse the decisions above cited," and then the opinion further says these former decisions are "in accord with many decisions in other states." There is no syllabus announcing the binding force of such a statute, because it would have been obiter to do this, if the court agreed with the prior decisions.

But the judge who wrote the opinion appears to concede the validity of such a statute. To us it seems unconstitutional for several reasons. In the first place, the court it attempts to bind is a constitutional court and could not be thus fettered. In the next place, if a prior decision is right, the legislature has exhausted its power in relation to what has been legislated, and it cannot be conceived that it is omnipresent in the future to accommodate itself to vacillation in judicial decision. Equally must the legislature be presumed to have exhausted its power, if a statute has been incorrectly interpreted, and change has for the first time made its will effective.

This reasoning, while generally applicable as indicated, yet leaves open a further question, and that is whether a statute of this kind may be valid in the establishing of a rule of property. May a legislature say that a series of decisions, extending over a certain period, where contracts are made in respect to construction therein, shall give rights and fix liabilities in accordance therewith? It seems to us, that this class of legislation

might be defended upon the principle of *inter est republicae sit finis litium*. But we do not believe such a statute is valid as to criminal offenses or as to torts.

There is a different aspect here from that of federal courts respecting construction by state courts of state laws, but the question is whether state courts may, in the face of such a statute, correct their own construction.

INSURANCE—CONDITION IN NOTE FOR LOAN ON POLICY VOID FOR USURY.—The principle that no device for evading the penalty of usury shall be effective, was applied by the Kentucky Court of Appeals to the case of a loan upon an insurance policy having a surrender value. *New York L. Ins. Co. v. Evans*, 124 S. W. 376.

The opinion recites that there was a loan agreement to secure the amount borrowed on the policy and "in the event of default in the payment of said interest or of any premiums on said policy * * * the company * * * is hereby authorized, at its option, to cancel said policy and its accumulations for the customary cash surrender," etc.

The court said: "The stipulation for forfeiting a substantial benefit for the non-payment of a note for money loaned was in the nature of a usurious extortion, and void as against the statutes." The court conceded, in the opinion, that the policy was forfeitable, or at least could be "lapsed"—a less harsh result, as by the latter the policy is not annihilated—and that the same result would ensue from non-payment of a note taken for a premium when non-payment is conditioned as the policy provides for non-payment of the premium itself.

The distinction, it is perceived, is as to repayment of interest on a loan on the policy as collateral.

The opinion refers to prior Kentucky decisions. *N. Y. L. Ins. Co. v. Curry & Bro.*, 115 Ky. 100, 72 S. W. 736, 61 L. R. A. 268, 103 Am. St. Rep. 297.

The distinction appears to us sound, and so very evident that it seems strange such a provision should be incorporated in a loan agreement. It is certainly an extortionate agreement, and the usury arises out of default exacting more than the interest provided to be paid. The court says: "In this loan agreement the incorporation of that additional feature, a burden on the policy, not in the original policy, was null for the same reason."

A ruling like this cannot be attributed to construction in favor of the insured. The principle is sound in general law.

IS DICTATION TO A STENOGRAPHER A PUBLICATION IN THE LAW OF LIBEL?

No citation of authorities is necessary to sustain the statement that in actions for slander or libel proof of publication is essential. The rule in civil actions, as generally stated, is that publication to any one or more third persons is sufficient. A well established exception to this rule is the privileged communication, or privileged occasion, as some writers and courts term it, that is, a communication made without actual malice by one in duty bound to speak, to a third person who has an interest in the matter communicated. The necessities and conveniences of transacting business are inducing the recognition of another exception, viz: that publication to private secretaries, clerks, stenographers, type-writers, printers, mail clerks, and telegraph operators is privileged, even though they have no personal interest in the communication. It is of this exception that this article treats.

In *Pullman v. Walter Hill & Co., limited*,¹ it was proved that defendants dictated a defamatory letter to their stenographer, who transcribed it on a typemachine; that the letter was then signed by defendants' manager, press-copied by the office boy, mailed to plaintiff, received by his clerks, and read by them in the usual course of business. The defendants contended that there was no publication, and that, if there were, the occasion was privileged. The court, however, decided that the stenographer had no interest in the contents of the letter, and that the occasion was, therefore, not privileged. Esher, M. R., said: "I do not think that the necessities or the luxuries of business can alter the law of England. If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself. If a company have deputed a person to write a letter containing libelous matter on their behalf, they will be liable for his acts. He ought to write such letter himself, and to copy it himself, and if he copies it into a book he ought to keep the book in his own custody."

Pullman v. Hill & Co. is in accord in principle with a prior case,² and contra to another.³ And if the court had considered the effect of the defamatory letter being read by plaintiff's clerks, its holding on that fact would doubtless have accorded with Lord Ellenborough's deci-

(1) 1 Q. B. 524 (1891).

(2) *Williamson v. Freer*, L. R. 9 C. P. 393. See also *Sadgrove v. Hole*, 2 K. B. 1 (1901).

(3) *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, L. R. 4 Q. B. 262.

sion at nisi prius, that the reading of a defamatory letter by plaintiff's clerk was a publication not privileged, it appearing that defendant knew that the clerk read plaintiff's letters in the usual course of the business.⁴

In 1894 the Queen's Bench departed from the strict rule of *Pullman v. Hill & Co.*, and decided that the dictation of a libelous letter for a client, by a solicitor, to the latter's office clerk did not destroy the privilege.⁵ And in a recent case *Pullman v. Hill & Co.* was distinguished, but in effect overruled, by the King's Bench in deciding that privilege covers all of the incidents of the transmission and treatment of communications which are in accord with reason and the usual course of business, and that there is no actionable publication in handing libellous matter to a telegraph operator for transmission.⁶

The courts of this country have followed the rule of *Pullman v. Hill & Co.*, and have rejected as unsound the reasons for the decision of *Edmondson v. Birch & Co.*⁷ In one case, however, it was decided that the dictation of a defamatory letter by the general manager to the stenographer of a corporation was not a publication, for the reason that the letter was the joint act of the corporation's own servants.⁸ On the other hand in a case where an officer of a corporation sent to twenty-nine other agents thereof, who were charged with the duty of hiring and discharging employees, a circular letter which contained a defamatory reason for the discharge of plaintiff, it was decided to be a libellous publication as to each agent.⁹

The rule adopted by the English court in *Edmondson v. Birch & Co.*¹⁰ is more consonant

(4) *Delacroix v. Thevenot*, 2 Stark. 63; 3 E. C. L. R. 317.

(5) *Boxsius v. Goblet Freres*, 1 Q. B. 943 (1894).

(6) *Edmondson v. Birch & Co.*, L. R. 1 K. B. 371 (1907).

(7) *Gambrell v. Schooley*, 93 Md. 48, 52 L. R. A. 87, 48 Atl. 730, 86 Am. St. Rep. 414; *Sun Life Assurance Co. v. Bailey*, 101 Va. 443, 44 S. E. 692. Delivery of libelous dispatch to a telegraph

Delivery of libelous dispatch to a telegraph operator is an actionable publication. *Samuel D. Patterson v. Western Union Telegraph Co.*, 72 Minn. 41, 40 L. R. A. 661, 74 N. W. 1022, 71 Am. St. Rep. 461; *Monson v. Lathrop*, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54. Delivery of a libelous matter to a third person specially employed to copy or translate it into a foreign language is not privileged. *Kiene v. Ruff*, 1 Ia. 482; *State v. McIntire*, 115 N. C. 769; *Adams v. Lawson*, 17 Gratt. 250, 94 Am. Dec. 455.

(8) *Owen v. Ogilvie Publishing Co.*, 32 App. Div. 465, 53 N. Y. Supp. 1033.

(9) *Bacon v. Mich. Cent. R. R. Co.*, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372.

with modern business methods and conveniences than that of *Pullman v. Hill & Co.*¹¹ which has thus far been recognized in our country. Meller, J., very well expresses the reasons for the adoption of another exception to the general rule of publication: "I know we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged."¹²

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(10) *Supra*, note 6.

(11) *Supra*, note 1.

(12) *Lawless v. Anglo-Egyptian Cotton & Oil Co.*, 4 Q. B. 262.

MATTERS PASSED UPON OR DECIDED BY LEGISLATIVE BODIES OR SPECIAL TRIBUNALS AS THINGS ADJUDGED.

It is a basic principle of our jurisprudence that when a matter has once been authoritatively decided between the same parties it may not be again drawn in question. This same doctrine or principle has given rise to the rule compelling respect for judicial precedents and obliging those who must subsequently pass upon the same point to respect what has gone before. Under these conditions the English common law has grown and the notion that a point or matter once decided shall be at rest for all time is the very foundation of that common law jurisprudence. The wisdom of this principle cannot be successfully questioned. If it were possible to repeatedly raise the same point or try the same cause there could be no end to litigation or turmoil. It must be conceded, therefore, if we agree that the principle is good as applied to the courts, that that principle is equally binding upon legislative bodies exercising quasi judicial functions. That is to say, if the doctrine which implies respect for the decision of a court based upon the necessity for having an end of litigation is not founded upon fallacy the reasoning applies with equal force to decisions of parliamentary bodies and

special tribunals and it must be regarded as equally fundamental that when a matter has once been passed by a legislative body exercising judicial functions that the decision shall be final as that a matter passed upon by the courts shall once for all be decided.

This principle is respected by parliamentary bodies even in their purely legislative functions. The rules of most of these limit the time within which a matter may be reconsidered and these rules as well as general parliamentary law provide that when a motion or a bill has once been considered and defeated it may not again be renewed during that session.¹ This principle, however, has not been made to extend beyond limits greater than those that are applied to judicial precedents, for example: Honorable John G. Carlisle, on December 5, 1888, Speaker of the National House of Representatives, following the precedent of Mr. Speaker Stevenson, of April 11, 1828, held that questions of order which affect merely the proceedings in the House and do not, like the judgments of courts, conclude the rights of parties are always open for re-examination and decision.² This doctrine is exactly like the rule of *stare decisis*, so well known in common law jurisprudence, for in making the ruling, Speaker Stevenson said when impelled by the conclusion that his prior judgment had been erroneous he should always change his previous rulings, so likewise the courts when they have concluded upon examination that a decision is erroneous refuse to follow it, but, nevertheless it must bind the parties to the cause in which it was rendered, consequently, when a matter has once been disposed of by a legislative body even though it has been in a mere matter of procedure or concerning the method of handling a bill, the legislature will refuse to be a second time concerned with that matter. Consequently when a National House of Representatives has once decided not to ask for a further conference with

(1) *Cushing's Manual*, sec. 1254.

(2) *Hines' Precedents of the House of Representatives*, sec. 4687.

the senate upon a matter which has been in disagreement, it is not in order to again make a similar motion when the disagreement is at the same stage.³ And the same rule prevails even though a recess of the congress has taken place between the two motions.⁴

If this doctrine is to be received as appears to be the case under the authorities examined, when matters of procedure merely are to be considered, clearly when the rights of parties are involved it should be respected.

An illustration of cases in which individual rights are concerned is that of the fixing of the limits of an assessment district and making provision for an assessment to defray the expenses of a special or local improvement. The authorities all agree that under such conditions the whole subject of taxing districts belongs to the legislature. It may delegate its power locally to common councils, township boards, county boards, and similar governing bodies so that the exercise of the delegated power is to all intents and purposes the exercise of the authority of the legislature and the action of such board is as conclusive and binding as if it were taken by the legislature itself, so that it will be impossible to attack the assessment on the ground that there is an error in judgment as to whether or not the district is peculiarly benefited, for the action of the legislative body must in general be deemed conclusive and is not subject to collateral attack except for fraud or manifest mistake or abuse of discretion.⁵ In all collateral proceedings, the benefits assessed are conclusively presumed to be received, and the assessment is not open to revision or review.⁶

The inquiry immediately arises as to what is meant or implied by this conclusiveness and the conclusion may not be escaped, that so far as collateral proceedings are concerned the will of the legislature has been

finally expressed and the parties who have been affected by this determination are bound by it and may not attack it save only upon grounds which would warrant an attack upon the judgment of a court. If this determination is conclusive upon the courts, ought it not on principle to be conclusive upon the same tribunal so as to prevent in that tribunal a re-examination of the questions which have been set at rest? It would seem upon principle that an affirmative answer to this question comes as a corollary to the original proposition for if like a judgment the determination of a legislative body involving the rights of parties may not be inquired into collaterally by the courts, it ought not to be open to re-examination in the legislative body itself. For example: if an assessment district has been fixed by a determination of the common council or the board of assessors of a city after appeals have been heard and decided, it ought not to be possible, after the lapse of some considerable time especially, to re-examine the question and fix new limits for the assessment district. Beyond question, the council may reconsider its action within such time as may be fixed by its rules, or within such time as may have been fixed by the rules of general parliamentary practice this is proper, and if a common council has fixed an assessment district by resolution there can be no doubt of the power of the council to reconsider this resolution and by subsequent action enlarge the district. Indeed, it would be strange if the council with additional light on the subject were concluded by the first resolution.⁷ Nevertheless when a common council has denied a petition for the vacation of a street under a charter provision authorizing the common council to vacate streets, and where there is also a general statute empowering the courts to vacate streets, such action by the council is binding upon both the courts and the council. A subsequent action of the same nature may not be invoked without showing such a change in circumstances as will warrant a vacation of the street for new reasons. Consequently outside parties are

(3) Hines' Precedents of the House of Representatives, sec. 6269.

(4) Hines' Precedents of the House of Representatives, sec. 6325.

(5) Cooley on Taxation, 2nd Edition, pp. 640, 641.

(6) Cooley on Taxation, 2nd Edition, p. 662.

(7) Trowbridge v. Detroit, 99 Mich. 443, 58 N. W. 368.

not at liberty to begin another proceeding and enforce repeated considerations of the question either before the council or in the courts.⁸

The principle beyond question is exactly similar to that which is enforced by the courts concerning *res adjudicata* and applies as well to tribunals which are given jurisdiction of parties upon particular controversies. Thus where the legislature has authorized the moving of a county seat and has provided for a finding of damages from such removal by a commission provided for by the act, such damages to be paid by the county, the county treasurer may not contest their finding where they have given a certificate of the recovery as the judgment of the commissioners is as conclusive in regard to the facts found by them as any other judgment.⁹ Likewise where the board of county commissioners under a statute is empowered to adjudicate claims against counties the decisions of that board are final and binding upon the county and upon the claimant.¹⁰ The board in such cases acts in a judicial capacity and its adjudications are as binding as the adjudications of any other court. The only remedy of parties aggrieved is by appeal.¹¹ The earlier Indiana statute appears to have been intended merely as a provision for the auditing of claims by the board and appears not to have intended to cut off an action.¹²

Not only are the decisions of county boards final upon questions of claims against the counties but they are also conclusive upon other matters, for example, where county commissioners are empowered upon petition to locate a private way such location is a binding adjudication until reversed by appropriate proceedings.¹³ The principle has also been amplified in election contests where the relocation of a county

seat was concerned and it is said¹⁴ that the decision of the board of county commissioners authorized to pass upon a petition for the election to determine the relocation of a county seat, that a petition filed with such board was not signed by a number of the resident electors of the county equal to three-fourths of all the votes cast in the county at the last general election and a conclusion upon that finding not to hold a re-location election is a final and conclusive determination and binds all the parties unless reversed or modified in the manner provided by law. The reasons for this ruling as stated in the opinion are "the decision of a special tribunal where it has jurisdiction of the subject matter and of the parties is conclusive unless reversed or modified in the mode provided by law."

Another illustration of the principle arises under one of the laws of Rhode Island providing for visitation of school districts and it is held that the finding of a visitor that a school district assessment is void is a conclusive adjudication as well upon the trustees of said district as upon the other parties concerned.¹⁵ The principle of all these authorities is identical with that which compels the holding that the adjudications of courts of general jurisdiction finally settle the controversy and the maxim that the end of litigation is the highest aim of the law, and applies as well to controversies before legislative bodies and special tribunals as before courts of general jurisdiction as was also said in Hibben v. Smith,¹⁶ concerning a decision of a board of trustees upon an appeal from an assessment "possessing the power to hear and determine under the statute in regard to the amount that ought to be assessed against appellant's property as benefits derived by reason of the improvement. The fact that the board through its misapprehension of the law or otherwise may have decided erroneously in regard to the question will not suffice to expose its judg-

(8) Detroit Real Est. Investment Co. v. Wayne Circuit Judge, 137 Mich. 108, 109 N. W. 271.

(9) Beall v. State, 9 Ga. 367.

(10) State v. Board, 101 Ind. 69.

(11) Maxwell v. Fulton Co., 119 Ind. 20, 19 N. E. 617.

(12) Board v. Gregory, 42 Ind. 32.

(13) Thomas v. Churchill, 84 Me. 446, 24 Atl. 899.

(14) Burke v. Perry, 26 Neb. 414, 42 N. W. 101; State, Hymer v. Nelson, 21 Neb. 572.

(15) Crandall v. James, 6 R. I. 144.

(16) 168 Ind. 206, 62 N. E. 447, affirmed, 191 U. S. 310.

ment to the collateral attack which appellant seeks under her pleadings to make for the rule is well settled in such cases that where a tribunal is invested with the power to decide in a matter such authority carries with it by implication the power to decide wrong as well as right, so long as the board of trustees keeps within the limits of its jurisdiction, its decision in the premises must be held to be binding and conclusive on all persons concerned until set aside or annulled by some direct proceeding known to the law based on reasons or grounds which the law recognizes as sufficient for that purpose."

It may not be concluded that such decisions of local boards and special tribunals are in all instances decisions in rem, unless they are, however, none will be bound save the immediate parties, for example: a coroner's inquest post-mortem into the cause of the death of one who was drowned, placing the blame for the death upon a municipality because of their negligence in not maintaining a bridge across the creek in proper condition is not such a final conclusive adjudication as will prevent the municipality from litigating the fact of its negligence in an action brought for the purpose of recovering an account of the negligence.¹⁷

As good a judicial exposition of the principle as exists may be found in *State v. Briggs*,¹⁸ in which it was sought to overturn the determination of a statutory board consisting of a justice of the peace and the surveyor of highways with respect to an encroachment on a public road. It was contended that their determination was conclusive and binding and that it barred a subsequent action of like character touching the same improvement.

The court said: "The question presented is whether this statutory proceeding, once begun and carried to completion, and standing unreversed, is a bar to subsequent action of like character touching the same encroachment."

(17) *State v. Cecil County Commissioners*, 54 Md. 426.

(18) 50 N. J. L. 114, 10 Atl. 423. See also *Glaze v. Bogle*, 105 Ga. 295, 31 S. E. 169.

It is a general principle that the decision of a tribunal of competent jurisdiction is binding and conclusive upon all other tribunals of concurrent power. If there be identity in the subject or thing litigated in the ground or cause of action, identity of persons or parties to the controversy, of the quality or rights in which they litigate, a judgment or decision is, until reversed, conclusive.

Is there to be ascribed to this proceeding the nature and quality of judicial action?

Those officers who constitute the body when it is called into being, discharge their general duties under the sanction of official oaths. Persons to be affected by the action of this body, in a proceeding of this character, must be brought before it by notice. They as a board are to examine into and decide on the fact of encroachment, of the persons who were guilty of it, and its extent. Their decision reduced to writing and signed by them, defining the limits of encroachment as they have determined it to be, is, until set aside or reversed, conclusive in determining the private right, so far as the provision in the law has binding force, and becomes an authoritative direction to the overseer of the highways, acting for the public, to throw down and remove enclosures, to the extent which shall have been determined by them, and their determination of the public and private right is not declared in the act to be merely a temporary and provisional arrangement, but stands without any prescribed limit to its duration.

There would seem to be no great room for doubt that the exercise of such power is marked by all the essential qualities of judicial action.

As the case now stands, there exists two determinations on the same subject matter, each apparently of equal force with the other, one fixing one line as defining the encroachment, the other another and a different line.

In this state of things, to which one of these is the adjoining landowner to conform? Under which will the overseer for

the time being assert his right to remove boundary fences?

I perceive no ground for believing that the later reverses or overturns the earlier action.

Can they both stand? If so, one overseer can adhere to and enforce one direction, and his successor in office may, with equal authority, choose to execute the other. Or may the same officer use one return to determine the rights of owners on one side of the highway, and the other to determine the rights of adjoining owners on the other side.

Again, the question may be asked, with what frequency may these proceedings undergo repetition? How often may the adjoining landowner be called upon to defend his right to maintain his enclosures? These two proceedings in point of time are separated by less than half a year. If they may be so frequent as that, why not often, at the whim and pleasure of the overseer of the highways? If one proceeding does not conclude further action, the possible number is illimitable.

I think every consideration of justice and convenience to the landowner, looked at in the light of public interest as well, requires that such proceedings, when once taken, shall, until set aside, be, as to existing facts, a bar to subsequent investigation before a like statutory tribunal."

After a review of these authorities there can be no escape from the conclusion that the doctrine of res adjudicata applies with equal force to the decisions of parliamentary and legislative bodies and special tribunals exercising judicial or quasi judicial functions, when the rights of individuals or of individuals and the public are involved and that the doctrine of stare decisis applies to all such determinations compelling on the one hand the termination of the litigation and on the other hand that respect for what has been previously decided which insures respect for and the stability of governmental institutions generally.

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SPECIFIC PERFORMANCE—REFUSAL OF WIFE TO CONVEY.

MAAS v. MORGENTHALER.

Supreme Court of New York, Appellate Division, Second Department, January 14, 1910.

Where the wife of the vendor refuses to execute a deed in specific performance of a contract made by her husband alone, the vendee may elect to take the premises subject to her dower right, with a deduction from the purchase price of a sum equal to the gross value of such right.

JENKS, J.: This is an appeal by the defendants from a judgment of the Special Term that decrees specific performance of a contract of the defendant Morgenthaler to convey real estate and that sets aside his conveyance thereof to the other defendant. The judgment is warranted by the facts found, and the exceptions to the rulings of the court are not of moment.

The appellants make objection in this court for the first time that the court could not decree specific performance because the contract of sale was executed by the owner of the premises alone, and yet he had a wife. His wife was not a party to this action. She was not a proper party to it. Richmond v. Robinson, 12 Mich. 193; Venator v. Swenson, 100 Iowa, 295, 69 N. W. 522. Specific performance could not be enforced against her in this action. Her dower rights cannot be determined in this action adversely to her (Dixon v. Rice, 16 Hun, 422, 425), and she cannot be compelled to accept a money compensation in lieu thereof (Bostwick v. Beach, 103 N. Y. 414, 9 N. E. 41; Roos v. Lockwood, 59 Hun, 181, 13 N. Y. Supp. 128). The judgment herein requires the defendant Morgenthaler to execute a deed in absolute fee simple. It does not appear that his wife has refused to join in the execution thereof, and we cannot surmise that she will refuse. She must decide that question for herself, and we cannot coerce her, as did the old court of chancery, by imprisonment of the husband in jail until his wife yielded. See Story's Equity Jurisprudence (13th Ed.) vol. 2, sec. 731 et seq. Story in his Equity Jurisprudence, at section 735, says:

"Where, indeed, there is no pretense to say that the wife is not ready and willing to consent to the act, and that defense is not set up in the answer, but the objections to the decree are put wholly upon other distinct grounds, there may be less difficulty in making a decree for a specific performance. Even

in such a case a court of equity ought not to decree in so important a matter affecting the wife's interest, without bringing her directly before the court and obtaining her consent upon full deliberation. But where the answer expressly shows an inability of the husband to comply with the covenant, and a firm refusal of the wife, it will require more reasoning than has yet appeared to sustain the justice or equity or policy of the doctrine."

In *Pulliam v. Pulliam's Heirs*, 4 Dana (Ky.), 124, the court allowed a reasonable time for determination by the necessary party to a conveyance. If she does refuse, yet the plaintiff may elect to take the premises subject to the dower right, with a deduction from the purchase money of a sum equivalent to the gross value of that right. *Bostwick v. Beach*, supra.

The decree should, therefore, be modified, so as to provide that, upon the failure of the defendant to deliver the deed required from him because of the refusal of his wife to join therein, the plaintiff may, within 10 days thereafter, elect to reject the purchase in toto, or to require the defendant to tender his deed, and of the character now required in the said judgment, and effective in all respects save as to the dower rights of his wife, whereupon the plaintiff may have an abatement in the purchase price equivalent to gross value of the dower right, or, that the plaintiff may apply to the Special Term for such amendment to her pleading as may permit her to recover damages in this action (see *O'Beirne v. Allegheny & Kinzua R. R. Co.*, 151 N. Y. 382, 45 N. E. 873; *Reynolds v. Wynne*, 127 App. Div. 69, 111 N. Y. Supp. 248; *Wilder v. Ranney*, 16 Wkly. Dig. 478), which, I may observe, may be declared a lien (*Price v. Palmer*, 23 Hun. 504), or to discontinue this action, without costs, and without prejudice to bringing another action for damages; and, as so modified, the judgment must be affirmed, with costs.

Judgment modified in accordance with opinion of JENKS, J., and, as so modified, affirmed, with costs. All concur.

NOTE.—The Principle of Implied Coercion Forbidding Suits for Specific Performance.—It may be freely conceded that the very great weight of American authority is with the principal case as to abatement or deduction—but some of the older cases view that as being akin to the old coercion rule, and we set forth some of them.

In *Riesz's Appeal*, 73 Pa. 485, Sharswood, J., said, following upon his citation of much Pennsylvania authority, that: "These cases settle, if any amount of authority can settle anything, that in Pennsylvania specific performance of an agreement to sell real estate will not be decreed

against a vendor who is a married man and whose wife refuses to join in the conveyance so as to bar her dower, unless, indeed, the vendee is willing to pay the full purchase money, and accept the deed of the vendor without his wife joining. The policy of these decisions is very manifest. The wife is not to be wrought upon by her love for her husband and sympathy in his situation to do that which her judgment disapproves as contrary to her interest; nor is he to be tempted to use undue means to procure her consent. The vendor must be left in such cases to his action in damages." * * *

The same sound policy which forbids a decree for the execution of a deed by the husband—to be enforced by his imprisonment if he cannot obey—prevents any decree looking to compensation, abatement or indemnity. The case does not fall within the principle of those decisions, where the vendor, who cannot make title to all he has contracted to convey, is held to be thereby not relieved from specific performance, so far as in his power; but shall be compelled to execute his contract with a reasonable abatement in price.

* * * Receipt of the purchase money in full may have been the main object of the sale to enable him to pay debts or carry out other plans. If he is to be subjected to serious pecuniary loss by his wife's refusal to join, it will operate almost as powerfully as the peril of his imprisonment, as a moral coercion and compulsion upon her to yield her consent, instead of that free will and accord which the law jealously requires her to declare by an acknowledgment upon an examination before a magistrate, separate and apart from her husband."

In *Brock's Appeal*, 75 Pa. 141, the above reasoning is expressly approved and Gibson, C. J., is quoted as saying: "It seems to be at last settled upon principles of policy and humanity, that equity stirs not to enforce a contract which involves in it a wife's volition in regard to her property, and it seems strange to us now, that courts of chancery should ever have hesitated about it. Contrary to the benign spirit of the common law, the avowed purpose of contempt against the husband is to extort a conveyance from her affection or her fear." In *Harrigan v. McAleese*, 16 Atl. 31, the Pennsylvania Supreme Court applied the rule of compelling husband to convey where the vendee proposed to take his deed alone and pay the full purchase money.

In *Graybill v. Brugh*, 89 Va. 895, 21 L. R. A. 133, 37 Am. St. Rep. 894, it is said, quoting from 2 Wary, on Vendors, p. 769, that: "Specific execution of an agreement to sell and convey will not ordinarily be decreed against a vendor, a married man, whose wife refuses to join in the deed, when there is no proof of fraud on his part in her refusal, unless the purchaser is willing to pay the full purchase money and accept the deed without her joining."

In *Cheatham v. Cheatham's Ex'or*, 81 Va. 395, it was said that: "If the husband and wife agree to sell and convey the wife's lands, the agreement cannot be specifically enforced against either of them; not against the wife, says Mr. Minor, because she is incapable of binding herself by any executory contract (the rule in Virginia); not against the husband, because coercion employed against him would be the moral coercion of the wife." Then the court adds: "And since the agreement cannot be enforced against them,

it follows that it cannot be enforced by them." This same rule as to wife's lands is stated in *Littlerall v. Jackson*, 80 Va. 604. In *Chilhowie Iron Co. v. Gardiner*, 79 Va. 305, specific performance was sought by husband and wife against proposed purchaser of wife's land and denied solely because no such remedy was available against them, had they refused.

In *Handy v. Rice*, 98 Me. 504, 57 Atl. 847, it appears that there is a statute, which provides that, if the wife refuses to join in a conveyance so as to release her dower interest, for a certain deduction be made and paid to the clerk for the wife's benefit, which, being done, the wife's dower interest is released. In the face of such a statute, specific performance is enforceable against the husband.

In *Barbour v. Hickey*, 2 App. D. C. 207, 24 L. R. A. 763, a learned discussion is pursued with the result of holding that husband could not be coerced into obtaining the wife's signature, because she has to declare she executes the deed willingly, and coercing him is coercing her. Then when it was insisted that at least a decree should be entered against the husband by his suffering an abatement of the purchase money equal to the contingent value of her dower the court said: "But to do this would be simply modifying the contract and decreeing its specific performance as modified. To ascertain the value of such contingent right of dower would necessarily involve a controverted question of fact—a question that would likely elicit a variety of opinion and judgment; and when determined it would not be the agreement of the parties but would be a distinct term introduced into the contract by the court. Such method of dealing with the contract is not consistent with the equitable doctrine of specific performance. The court should either execute the contract as made by the parties or decline the exercise of the jurisdiction altogether." It was held there was a remedy at law. In *Reilly v. Smith*, 25 N. J. Eq. 158, the New Jersey rule seems the same as the Pennsylvania, where there is no fraud on husband's part as to wife's refusal and she is merely actuated by considerations having reference to her own interest. "The court will not under such circumstances compel the husband to procure a conveyance or release by her or require him to furnish an indemnity against her dower."

The case of *Peeler v. Levy*, 26 N. J. Eq. 330, shows the same ruling as in Virginia cases, *supra*, but the reasoning was not on same line. Thus where the purchaser knew it was wife's property it was said to be "unconscionable for one man to take the promise of another to do a particular thing" which cannot be performed except by consent of another and on the other's refusal "to demand a strict and literal fulfillment of the promise." Where it is his own property this case says: "To warrant a decree of indemnity, it must appear the refusal is not the voluntary act of the wife, but the device of the husband."

In *Plum v. Mitchell*, 16 Ky. L. R. 162, 26 S. W. 391, the remedy for wife's refusal is said to be an action for damages. This, however, seems thus decided on the pleadings and there is no discussion.

It is perceived, that there is reasoning for the view that only damages are recoverable in cases

of refusal by the wife by judges whose names are greatly honored in the law—such as Gibson and Sharswood.

The homestead cases also which we subjoin appear, in their spirit, related to this theory. Nevertheless the view that woman's greater independence and freedom in contract aid the majority position is plausible, though it might be contended that the greater this freedom, the more should the matrimonial relation be unvisited by contractual disputes between husband and wife.

In *Schwab v. Barremore*, 95 Minn. 295, 300, 104 N. W. 10, it was said: "We do not question the proposition that where a husband contracts to convey land owned by him, a part of which constitutes his homestead, and his wife refuses to join in the conveyance, he may be compelled to perform to the extent of his power by conveying his interest in the land," and to this is cited *Weitzner v. Thingstad*, 55 Minn. 244, 56 N. W. 817. The precise meaning of this statement is only understood by reading the cited case, which holds that so far as the contract affects the homestead, it is void, and to that extent would not give any basis for any claim to damages, because this would place the wife "in the dilemma of either having to sign the deed or see her husband mulcted in damages," and this "might, and naturally would, often indirectly defeat the very object of the statute." The case held, however, that as to other than the homestead land, though this were part of the land to be conveyed, an action for damages would lie for refusal to convey.

Other cases in accord with the Minnesota court in reference to homestead are *Hotchkiss v. Brooks*, 23 Ill. 386; *Watson v. Doyle*, 130 Ill. 415. In Texas the contract becomes enforceable after the death of the wife or removal of the family from the land. *Allison v. Shilling*, 27 Tex. 450, 86 Am. Dec. 622. See also *Barnett v. Mendenhall*, 42 Iowa 296; *Phillips v. Stauch*, 20 Mich. 369; *Moses v. McClain*, 82 Ala. 370.

We do not cite the cases on the majority side nor attempt their discussion, as they are very numerous and they do not run much to discussion of the implied coercion hereinabove considered.

JETSAM AND FLOTSAM.

FAILURE TO SET FORTH LITERAL AND EXACT COPY OF INSTRUMENT IN AN INDICTMENT FOR FORGERY.

The appellate courts are now running the gauntlet of professional criticism voiced by the entire legal press for every decision which permits a good case to ride off to defeat on a pure technicality. Whether our appellate courts will be able to face the united batteries of the legal press is a question. The explanation which these judges feel called upon to make so frequently shows that the aim of the batteries has at least been accurate and that some of the shots have struck home..

The latest onslaught has been upon the Illinois Supreme Court, for their decision in the recent case of *People v. Tilden* and this criticism is well stated by Prof. John H. Wigmore

in the March number of the Illinois Law Review as follows:

"Until now the Supreme Court of Missouri (we believe) has held the cup for extreme technical treatment of indictment allegations. The cup now passes (let us hope, for a time only) to the Supreme Court of Illinois. In People v. Tilden and Graham, 242 Ill. 536, 90 N. E. 118 (1909, Dec. 22), the defendant was indicted for forgery of a note, "which said note" (the allegation was) "is in words and figures, in substance, as follows, to-wit," and then the words and figures of a note are set forth. After verdict of guilty—i. e., after a verdict finding that the defendant did make and utter a note precisely of the tenor thus set forth, a motion in arrest of judgment raised the objection that the indictment "does not profess to set forth a literal copy of the instrument." This motion was granted, on error brought, and the defendant was discharged.

"Why (1) Because an indictment must set forth a literal and exact copy—as the learned court demonstrates by a long array of authorities. This, however, the indictment did do. That much the court does not deny; moreover, the verdict settled that the literal tenor alleged in the indictment corresponded exactly with the actual tenor of the instrument introduced at the trial. But (2) because, furthermore, the indictment must also profess to set forth a literal copy, and because the profession in the above indictment, which would have been otherwise sufficient (Chitty, Criminal Law, III, p. 1040, and other authorities quoted by the learned court), was spoiled by inserting the words "in substance." What of this reason? The learned court says that "If the pleader's allegation of the substance of the instrument is accepted, the defendant is bound by the pleader's construction instead of the court's." Not at all, we venture to think. The doctrine of variance protects the defendant completely. The verdict could not stand, by the rules of variance, if the actual note had varied in one word or figure from the tenor alleged in the indictment. Hence, the net result is that the mere empty allegation of the indictment (the "in substance" insertion) spoils the whole trial and nullifies the whole crime. The man forged exactly that instrument; this the jury found. Yet the Supreme Court discharged him because in two harmless words the indictment diluted its specific profession to set forth the "words and figures as follows." It did set forth a literal copy; that literal copy was found to be literally true; but it didn't profess to set forth a literal copy!

"We are advised by the opinion to seek consolation in the usual method: "If a change in the rule of law under consideration is necessary to the promptness and certainty of the course of justice, it is the province of the legislature, and not of the courts, to make the change." We respectfully decline to see any need for applying to the legislature in this case. Does the learned court cite a single prior judgment of its own on this point that the indictment must not only actually set forth, but must profess to set forth, and that such a profession is insufficient if the words "in substance" are interpolated into an otherwise good profession? Not one. All the precedents in the opinion profess to deal only with point (1) above, i. e., that the indictment must actually set forth. Since, then, the Supreme Court of Illinois has no precedent of its own on this very point, binding it to stare decisis, why it is not free

to declare sensible law? What call is there for us to go to the legislature to change the law of a prior decision which does not exist? We call in an architect or a carpenter to change the structure of our house; but we do not need an architect to sweep down cobwebs of our own creating.

"And so ends vainly the effort of the People of the State of Illinois to do justice on the callous wretches who ruined the honest, humble depositors in the Milwaukee Avenue State Bank less than four years ago. Stensland and Hering set free on parole, by maudlin laxity; and in the same month Tilden and Graham, the mean forgers of the notes, set free by a judicial cobwebbing of their conviction.

"What does it all signify, this business of the criminal law? Not much, sometimes. Why should Tom, Dick and Harry be so afraid to commit a crime, after all? Non liquet. If our profession is really in earnest, it ought to awake to the literal truth of the following judicial utterance, made some fifteen years ago: "We have long since passed the time when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty." (Freeman, J., in Roper v. Territory, 7 N. Mex. 272, 33 Fec. 1014).

"And what is it that is enchanting the community in this Laocoon-like struggle? Mostly cobwebs! Legal cobwebs, of our own creation.

J. H. W."

HUMOR OF THE LAW.

In a suit tried in a Virginia town a young lawyer was addressing the jury on a point of law, when good naturedly he turned to the opposing counsel, a man of much experience, and asked:

"That's right, I believe, Colonel Hopkins?" Whereupon Hopkins, with a smile of conscious superiority, replied:

"Sir, I have an office in Richmond wherein I shall be delighted to enlighten you on any point of law for a consideration."

The youthful attorney, not in the least abashed, took from his pocket a half-dollar piece which he offered to Colonel Hopkins, with this remark:

"No time like the present. Take this, sir; tell us what you know and give me the change." —Pittsburg Chronicle Telegraph.

Representative Adamson of Georgia, who is a heavy-weight and above forty, was strolling through the subway connecting the House office building with the Capitol.

"Say, judge," queried a newspaper man, "when are you folks going to get in automobiles in the subway. The Senate has had them for months."

"We fellows in the House don't need them at all," chirped the member from Georgia. "We are frisky and vigorous. Those aged decrepit Senators aren't able to walk to and from their offices. They have to ride. I don't guess we'll ever ask for automobiles."

And the judge quickened his pace to show his youthfulness.

WEEKLY DIGEST.

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1. Abduction—Prosecution. — Pen. Code, sec. 267, punishing one who takes any female under 16 years old for the purpose of prostitution, does not require the female abducted to have been unmarried in order to justify a conviction.—People v. Newton, Cal., 106 Pac. 247.

2. Adverse Possession—Exclusive Possession. —Pasturing the owner's cattle on land enclosed for that purpose and under his exclusive control is such use and enjoyment as is sufficient under the five years' statute.—Hardy Oil Co. v. Burnham, Tex., 124 S. W. 221.

3. Alteration of Instrument—Right to Sue on Debt. —Unless an alteration of a note given for goods sold was fraudulently made, the seller could sue in assumpsit for the value of the goods, though the alteration invalidated the notes so as to prevent an action thereon.—McCormick Harvesting Mach. Co. v. Blair, Mo., 124 S. W. 49.

4. Appeal and Error—Order of Discontinuance. —The order discontinuing an action does not prevent a judgment from which an appeal might be taken, and is not appealable.—Puffer v. Welch, Wis., 124 N. W. 406.

5. Attachment—Bond. —That an agent in suing out an attachment and giving bond might be guilty of a tort for which an action might be brought against both principal and agent would not disqualify him as a surety.—Levin v. American Furniture Co., Ga., 66 S. E. 888.

6. Bankruptcy—Contempt. —The petition of a trustee in bankruptcy, asking that the bankrupt be adjudged in contempt for failing to obey an order to pay over money or turn over property, is not required to allege affirmatively that he was able to comply with the order.—In re Stavrahn, U. S. C. C. of App., Second Circuit, 174 Fed. 330.

7. Property Passing to Trustee. —A policy of insurance on the life of a bankrupt, payable to his wife if she survives him, but, if not, to his estate or designated beneficiary, and which he has the right to surrender at any time for paid-up insurance "or other value," is not the property of the wife, but of the bankrupt during his lifetime, and passes to his trustee, where the company is willing to pay a cash surrender value.—In re White, U. S. C. C. of App., Second Circuit, 174 Fed. 333.

8. Banks and Banking—Deposits. —That checks were payable to the order of a city treasurer and indorsed by him was not notice to a bank that they should not be paid.—City of Newburyport v. Spear, Mass., 90 N. E. 522.

9. Bills and Notes—Certificates of Deposit. —A certificate of deposit in the usual form, payable to the depositor, with interest, at a stated time, in current funds, on its return properly indorsed, is a negotiable instrument, having the qualities of a negotiable promissory note.—Forrest v. Safety Banking & Trust Co., U. S. C. C. E. D. Penn., 174 Fed. 345.

10. Insolvency of Maker. —Insolvency of the maker of a note, so as to excuse the holder from suing thereon, at the request of the indorser, held the absence of property of the debtor out of which a debt might be made by execution.—First Nat. Bank v. Robinson, Tex., 124 S. W. 177.

11. Carriers—Carriage of Goods. —Where, in an action against carriers for injuries to goods, no limitation of their common law liability was pleaded, none could be proved, and plaintiffs were not required to show defendants' negligence.—Cleveland, C. C. & St. L. Ry. Co. v. Schaefer, Ind., 90 N. E. 502.

12. Delivery of Goods. —If it is the custom to forward goods by boat from the carrier's line to the consignee, and he knows this when he ordered the goods shipped, and the owner of a boat has previously received goods for him, the carrier may deliver the goods to such owner for transportation.—Chesapeake & O. Ry. Co. v. Lavin, Ky., 124 S. W. 274.

13. Loss of Goods. —Where a carrier, sued for damage to goods, defends on the ground that it accrued through an inherent vice in the goods, the burden of establishing such defense is upon the carrier.—Southern Express Co. v. Bailey, Ga., 66 S. E. 960.

14. Chattel Mortgages—Extinguishment. —A payment on a mortgage and the giving of a note secured by a warehouseman's receipts, accompanied by indorsement upon the mortgage and note and surrender thereof, held an extinguishment of the mortgage.—Farkas v. Third Nat. Bank, Ga., 66 S. E. 926.

15. Constitutional Law—Licenses. —A city license for the sale of non-intoxicating beverages held a privilege, and that the revocation thereof is not a deprivation of property without due process of law.—Cassidy v. City of Macon, Ga., 66 S. E. 941.

16. Licensing Undertakers. —Laws 1905, p. 1268, c. 572, sec. 6a, requires one engaged in the business of an undertaker to obtain a license, held invalid.—People v. Ringe, N. Y., 90 N. E. 451.

17. Druggist's Permits. —Laws 1909, p. 266, c. 183, imposing on district judges certain duties as to the issuance of druggist's permits, is not unconstitutional, though such duties are

administrative and not judicial in character.—*Kermott v. Bagley*, N. D., 124 N. W. 397.

18.—Police Power.—Laws 1909, p. 277, c. 187, in so far as it included substitutes for beer in the definition of intoxicating liquors, held a proper exercise of police power, and not repugnant to Const., secs. 1, 13, as infringing personal liberty.—*State v. Fargo Bottling Works Co.*, N. D., 124 N. W. 387.

19.—Statutes Limiting Hours of Labor.—The provision of St. 1909, p. 279, c. 181, regulating hours of employment in mines and smelters, that the hours of labor shall be consecutive, held a matter of legislative policy not reviewable by the courts.—*Ex parte Martin*, Cal., 136 Pac. 235.

20. Contracts—Duress.—Threats made by one member of a mining partnership to another that, unless the latter signed a contract presented to him, the former would advance no more money to develop the mine, which should be shut down and rendered worthless, did not constitute duress which would invalidate the contract.—*Connolly v. Bouck*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 312.

21. Corporations—Garnishment.—A garnishing creditor having intervened in a suit to dissolve a corporation, the court held to have properly determined that he acquired no priority as to the funds caught on the garnishment over other corporate creditors.—*Patterson v. Beck*, Ga., 66 S. E. 911.

22.—Pleadings.—It is not necessary, in a suit by a private corporation, to allege in the petition that the suit is authorized by the governing body thereof.—*De Zavala v. Daughters of the Republic of Texas*, Tex., 124 S. W. 160.

23.—Use of Similar Names.—Under General Corporation Law (Consol. Laws, c. 23), sec. 6, the "Corning Glass Company" held not entitled to restrain the use of the name "Corning Cut Glass Company," where it was not in fact damaged, and where the businesses were not the same.—*Corning Glass Works v. Corning Cut Glass Co.*, N. Y., 90 N. E. 448.

24. Criminal Trial—Limiting Number of Witnesses.—The trial court may use a sound discretion in the matter of limiting the number of witnesses, especially on questions of impeachment merely.—*State v. Bowerman*, Mo., 124 S. W. 41.

25. Damages—Sheriffs and Constables.—In an action on the bond of a sheriff for a false return of a summons, resulting in default judgment against plaintiff, the sheriff held entitled to show, in mitigation of a substantial recovery, that plaintiff's payment of the judgment liquidated a just debt.—*State ex rel. Armour Packing Co. v. Dickman*, Mo., 124 S. W. 29.

26. Death—Excessive Damages.—In an action for death, the charge that the jury may assess such sums of money as they think would be right under the circumstances, not exceeding the amount claimed in the complaint, is erroneous.—*Pittsburg, C. C. & St. L. Ry. Co. v. Sudhoff*, Ind., 90 N. E. 467.

27. Dedication—Acts Constituting.—The conveyance of land with reference to a recorded map, on which a plot of ground is marked "park" does not amount to a dedication of such plot to the public or ratify a parol dedication by a former owner of which the grantor had no notice.—*Adoue & Lobit v. Town of La Porte*, Tex., 124 S. W. 134.

28.—Designation of Square.—Where proprietors of a town site in the recorded plat designated a block as a "square," it indicates an intent to dedicate the block to a public use.—*Daughters v. Board of Riley Co. Com'rs*, Kan., 106 Pac. 297.

29. Deeds—Restraint of Alienation.—A general restraint on the power of alienation, when incorporated in a deed otherwise conveying

the fee-simple right to the property, is void.—*Diamond v. Rotan*, Tex., 124 S. W. 196.

30. Easements—Duration.—Easements of a passageway and light and air, appurtenant to an estate partitioned, held not to terminate with the death of the tenant to whom they were granted, but passed to his successors in estate.—*Bornstein v. Doherty*, Mass., 90 N. E. 581.

31.—Right-of-Way.—A deed giving a right-of-way only for the benefit of abutting estates—that is, three adjoining lots, presently owned by the same person—is not available to other contiguous lots.—*Rogers v. Powers*, Mass., 90 N. E. 514.

32. Eminent Domain—Compensation.—Under Rapid Transit Act (Laws 1901, p. 1423, c. 587), sec. 1, an owner of land abutting on a street, under the surface of which a subway for a railroad is built, held entitled to compensation for injuries to his land occasioned by it being deprived of its lateral support.—*In re Board of Rapid Transit R. Com'rs of City of New York*, N. Y., 90 N. E. 456.

33.—Damages.—In estimating damages for depreciation in value of land not taken by a railroad company, evidence as to the effect of smoke, cinders, and noise held competent.—*Savannah, A. & N. Ry. Co. v. Williams*, Ga., 66 S. E. 942.

34.—Damage to Abutting Owner.—An abutting owner who owns no part of a street has a right to the lateral support of the land in the street, and he may recover damages for the physical impairment of his property, occasioned by the construction of a subway under the surface of the street for the operation of a railroad.—*In re Board of Rapid Transit R. Com'rs of City of New York*, N. Y., 90 N. E. 456.

35. Evidence—Personal Injuries.—Expressions of pain uttered by a person receiving a personal injury held admissible as illustrative of the character and extent of the injury.—*St. Louis Southwestern Ry. Co. v. Jackson*, Ark., 124 S. W. 241.

36. Executors and Administrators—Conflict of Laws.—Where a decedent owns real estate in a state other than his domicile, such real estate is subject to the local laws of the state where situated, and no owner can take or hold it otherwise than in conformity to those laws.—*Rackemann v. Taylor*, Mass., 90 N. E. 552.

37.—Sale of Land.—The administrator of an insolvent, whose entire estate consists of land held under bond for title, may have the land sold and receive the proceeds after paying the debt and costs.—*Streetman v. Streetman*, Ga., 66 S. E. 883.

38. False Pretenses—Indictment.—An indictment for false pretenses held insufficient for failure to negative the matter as to which the alleged false pretense was made.—*Commonwealth v. Nunnelly*, Ky., 124 S. W. 313.

39. Fire Insurance—Avoidance of Policy.—A clause in a fire policy as to forfeiture for foreclosure proceedings or notice of sale held proper to safeguard the insurer against increased risks.—*Hartford Fire Ins. Co. v. Hollis*, Fla., 50 So. 935.

40.—Sprinkler System.—A stipulation that insured should use due diligence in maintaining a sprinkler system held a warranty, and not a representation.—*Port Blakely Mill. Co. v. Springfield Fire & Marine Ins. Co.*, Wash., 106 Pac. 194.

41. Food—Misbranding.—An article of food described on the labels under which it was sold as molasses, but which labels distinctly stated that it was a compound of molasses and corn syrup, held not adulterated nor misbranded.—*United States v. Seven Hundred and Seventy-nine Cases of Molasses*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 325.

42. Fraudulent Conveyances—Services of Insolvent.—A person, though insolvent, can legally give away his services, and such act is not a fraud on his creditors.—*Brand v. Bagwell*, Ga., 66 S. E. 935.

43. Highways—Establishment.—An order establishing a highway cannot be collaterally attacked in a proceeding to restrain the road

commissioner from cutting down banks adjoining the highway.—*Graham v. Ballard*, Cal., 106 Pac. 215.

44. **Homestead**—Incidental Use for Business Purposes.—Where a person actually resided upon premises claiming them as a homestead, the right was not affected by the fact that she used part of the building for hotel purposes.—*Hohn v. Pauly*, Cal., 106 Pac. 266.

45. **Homicide**—Dying Declarations.—Statements of deceased in his dying declaration as to his expectation of trouble with defendant are not admissible.—*People v. Cyty*, Cal., 106 Pac. 257.

46.—Self-Defense.—In a prosecution of a wife for the murder of her husband, where she claimed self-defense, evidence that deceased had on other occasions beat her was properly excluded.—*Hutcherson v. State*, Ala., 50 So. 1027.

47. **Husband and Wife**—Conveyance to Wife.—A deed of land by the husband to the wife, executed prior to the married woman's act, held void in law, but valid in equity, as creating an equitable separate estate in the wife.—*Neville v. Cheshire*, Ala., 50 So. 1005.

47.—Injury to Wife.—A husband cannot recover for the damage to himself by reason of negligent injury to his wife, where the wife cannot recover for her own injury.—*Gardner v. Boston Elevated Ry Co.*, Mass., 90 N. E. 534.

49.—Rights of Husband.—Where the right of the wife, married prior to the Married Woman's Act, was a common law estate, the husband was entitled to the rents and profits thereof.—*State ex rel. Armour Packing Co. v. Dickmann*, Mo., 124 S. W. 29.

50.—Wife's Separate Estate.—All personal property belonging to a woman at the time of her marriage belongs to her as her separate estate, unless reduced to the husband's possession by the wife's express, written assent, under the express provision of Rev. St. 1899, sec. 4340 (Ann. St. 1906, p. 2382).—*McKee v. Downing*, Mo., 124 S. W. 7.

51. **Infants**—Contracts.—Where an infant purchased property under fraudulent representations that he was of age and failed to pay for it, the seller was entitled to recover the property as against attaching creditors of the infant.—*Wray v. Hale*, Mo., 124 S. W. 38.

52. **Intoxicating Liquors**—Nuisance.—In a prosecution for keeping a liquor nuisance, an instruction that, if defendant sold or kept beer for sale at the time and place, charging it was immaterial that he did not own or lease the place, or who did own or lease it, was erroneous.—*State v. Kruse*, N. D., 124 N. W. 385.

53. **Judgment**—Decree.—While ordinarily a judgment is not a lien on personality until levy thereon by execution, a chancery decree may, in terms, establish liens upon personality as well as realty so as to bind all persons having notice thereof.—*Kithcart v. Kithcart*, Iowa, 124 N. W. 305.

54.—**Res Judicata**.—Judgment dissolving bill to enjoin action at law on a note of a partner to a firm held not res judicata of the question whether the note after dissolution became a private debt of the partners.—*Summerson v. Donovan*, Va., 66 S. E. 822.

55. **Landlord and Tenant**—Condition of Premises.—Where a landlord neither retained control over the drainage nor agreed to make repairs thereof, but voluntarily caused the drainage to be examined on the report of a noxious odor, no liability was imposed on him, unless the work was negligently performed.—*Stewart v. Cushing*, Mass., 90 N. E. 545.

56.—Distress.—A landlord having rent due for premises in another state or under a lease made in another state, may collect his rent by distress in the state.—*Davis v. De Vaughn*, Ga., 66 S. E. 956.

57.—Sale of Leasehold.—A leasehold cannot be sold without the consent of the landlord, and it has no market value.—*Steger v. Barrett*, Tex., 124 S. W. 174.

58. **Libel and Slander**—Special Damage.—Libelous language with reference to a person's

conduct in his office or profession held actionable without averment of special damage.—*Schreiber v. Gunby*, Kan., 106 Pac. 276.

59. **Licenses**—Amount of Fee.—The rule that the amount of a license fee imposed as a tax is ordinarily a question for the taxing power is subject to the limitation that the tax must not amount to a prohibition of any lawful business.—*City of Louisville v. Pooley*, Ky., 124 S. W. 315.

60.—Double Taxation.—It is not double taxation to impose a license tax on a business and at the same time to tax the capital used by the ad valorem system.—*Bradley v. City of Richmond*, Va., 66 S. E. 872.

61. **Life Insurance**—Date of Issuance.—When a company receives an application for insurance and executes a policy and forwards it to its agent for delivery, the policy is deemed to have been issued from its deposit in the mails.—*Francis v. Mutual Life Ins. Co. of New York*, Or., 106 Pac. 323.

62.—Extended Insurance.—A provision of the contract between the life insurance company and a company to whom its risks were transferred held not to affect a policy-holder's right to extend insurance as against the reinsurance company.—*Federal Life Ins. Co. v. Arnold*, Ind., 90 N. E. 493.

63. **Limitation of Actions**—Torts.—That on the permanent raising of a dam defendant paid plaintiff a certain sum per year as damages did not stop the running of limitations for flooding plaintiff's land; there being no evidence that plaintiff's cause of action was merged in the payment of damages.—*Abilene Light & Water Co. v. Clack*, Tex., 124 S. W. 201.

64. **Lotteries**—What Constitutes.—A scheme by which purchasers of lots were allowed to draw for a lot to be received in addition to the purchase held a lottery.—*Whitley v. McConnell*, Ga., 66 S. E. 933.

65. **Mandamus**—Compelling Signing of City Ordinance.—A mandate to the city clerk of Los Angeles for his refusal to sign an ordinance may properly go no further than to order him to perform his plain duty of signing it.—*City of Los Angeles v. Leland*, Cal., 106 Pac. 218.

66.—Nature of Remedy.—Mandamus against an irrigation district in aid of execution on the judgment is in the nature of a remedy rather than an original cause of action.—*State v. Middle Kittitas Irr. Dist.*, Wash., 106 Pac. 203.

67. **Master and Servant**—Assumed Risk.—An employee, whose duty it is to run an elevator and assist the engineer, cannot recover for injuries received while endeavoring to repair a defective appliance on the elevator.—*Archer v. Eldredge*, Mass., 90 N. E. 525.

68.—Assumption of Risk.—A servant does not assume the risk of danger from an insecurely fastened furnace door about which he is to work, where he has no knowledge of the defective condition of the fastenings.—*Jones v. Tennessee Coal, Iron & R. Co.*, Ala., 50 So. 1017.

69.—Injury to Servant.—A railroad engineer held negligent in going under his engine to make repairs while another train was attached thereto, so as to prevent him from recovering for injuries caused by the other train pulling ahead and moving his engine.—*Louisville & N. R. Co. v. Lumpkin*, Ky., 124 S. W. 318.

70.—Injury to Servant.—A minor held not guilty as matter of law of contributory negligence in proceeding with his work without putting props under the roof of the mine.—*Muren Coal & Ice Co. v. Copeland*, Ind., 90 N. E. 489.

71.—Injury to Servant.—In an action for injuries to a switchman occasioned by his toe becoming caught against the end of planks in a crossing over switch tracks, the jury held justified in finding that the railroad negligently constructed and maintained the crossing.—*Hamilton v. Chicago, B. & Q. Ry. Co.*, Iowa, 124 N. W. 363.

72.—Medical Treatment.—Where a mining company undertakes to furnish medical treatment for its employees, it is liable for the negligence of the physician employed by it in

discharge of such undertaking, though it makes no deduction therefor from the wages of the employee.—*Texas & Pacific Coal Co. v. McWain*, Tex., 124 S. W. 202.

73.—**Negligence of Engineer.**—A train having stopped on a switchman's signal for the purpose of uncoupling cars, it was negligence for the engineer to start without a signal to that effect.—*Houston & T. C. R. Co. v. Mayfield*, Tex., 124 S. W. 141.

74.—**Negligence of Independent Contractor.**—The owner of building is liable for injuries to his servant resulting from the negligence of an independent contractor in failing to properly fasten a fire escape to the building.—*Winslow v. Commercial Bldg. Co.*, Iowa, 124 N. W. 320.

75. **Mines and Minerals—Injuries to Surface Rights.**—The right to take ore from underneath the surface of a railroad right-of-way must yield, if the surface will be impaired.—*St. Louis & S. F. R. Co. v. Yankee*, Mo., 124 S. W. 18.

76. **Mortgages—Payment.**—In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, evidence that the senior mortgage had been paid before its foreclosure held admissible, in view of Code 1907, sec. 4899.—*Davis v. Anderson*, Ala., 60 So. 1002.

77.—**Transfer after Payment of Debt.**—A chattel mortgage cannot be transferred after extinguishment of the debt by payment of money belonging to the mortgagor.—*Porter v. Title Guaranty & Surety Co.*, Idaho, 106 Pac. 299.

78. **Municipal Corporation—Injunction.**—Owners of property abutting on a public street, whose rights, damages, and injuries are alleged to be of the same kind, differing only in extent and amounts, may join as complainants in a bill to restrain the maintenance of an obstruction in the street.—*Louisville & N. R. Co. v. Cowley*, Ala., 50 So. 1015.

79. **Negligence—Contributory Negligence.**—Where a person knowingly puts himself in a place of obvious peril without necessity, and injury results, he cannot recover notwithstanding the negligence of the person injuring him.—*Columbus Ry. Co. v. Asbell*, Ga., 66 S. E. 902.

80. **Parent and Child—Advancement.**—Whatever shows an intention by a parent to discriminate against one of his children in the distribution of his property tends to overthrow the presumption that he intends a deed to another as an advancement.—*Plowman v. Nicholson*, Kan., 106 Pac. 279.

81.—**Torts of Child.**—A father's liability for the acts of his child done in the course of his employment of the child is governed by the rules applicable to the relation of master and servant.—*Lessoff v. Gordon*, Tex., 124 S. W. 182.

82. **Partition—Jurisdiction.**—In making partition of land between tenants in common, the court has jurisdiction to annex reasonable easements of passageway and of light and air to one part of the land and impose such servitude on another part.—*Bornstein v. Doherty*, Mass., 90 N. E. 531.

83. **Partnership—Assignment to Co-Partner.**—A partner becoming the sole owner of a partnership claim by assignment from the co-partner may sue thereon.—*Boyce v. Gordon*, Cal., 106 Pac. 264.

84. **Payment—Draft.**—Where insured property was destroyed and the insurance company's adjustor gave the insured drafts on the company for the amount of the loss, which were not paid, the insured was entitled to recover thereon.—*American Ins. Co. v. McGehee Liquor Co.*, Ark., 124 S. W. 252.

85. **Pledges—Enforcement.**—In an action on a note secured by pledge of an unmatured vendor's lien note, the court properly foreclosed the lien on the note pledged and ordered the same sold to satisfy the judgment on the note sued on, instead of foreclosing the vendor's lien.—*City Loan & Trust Co. v. Sterner*, Tex., 124 S. W. 207.

86. **Public Lands—Abandonment of Claim.**—Where the purchaser of school land, after cancellation for abandonment, voluntarily made a second application and was awarded a second allotment, he acquiesced in the cancellation of his first purchase.—*Williams v. Robinson*, Tex., 124 S. W. 85.

87. **Railroads—Care Required Toward Passengers.**—A railroad company owes a higher degree of care to a passenger in providing a safe means of exit than it would owe to one of its servants.—*Silva v. Boston & M. R. R.*, Mass., 90 N. E. 547.

88.—**Duty to Stop.**—Where a freight train was given by a person on the track at a flag station the signal for a passenger train to stop, held, it was not negligence not to stop.—*Wright v. Atlantic Coast Line R. Co.*, Va., 66 S. E. 948.

89.—**Ejection of Intoxicated Passenger.**—If a passenger was not so intoxicated that he was unable to understand the dangers to which he was exposed at the place he was ejected, he could not recover for injuries occurring after he was put off, caused by his failure to exercise due care for his safety.—*St. Louis, I. M. & S. Ry. Co. v. Dallas*, Ark., 124 S. W. 247.

90.—**Negligence.**—In a passenger's action for injuries by her hand being caught between a car door and the door jamb, when the door suddenly shut, after it had been opened and caught, whether the company was negligent because of defects in the door or door catch, or because of the brakeman's failure to properly fasten it, held for the jury.—*Silva v. Boston & M. R. R.*, Mass., 90 N. E. 547.

91.—**Riding on Freight Trains.**—Riding on freight trains is hazardous, as everyone is presumed to know and appreciate, and one of such hazards is the sudden bumping or jerking of the cars.—*Pittsburg, C. C. & St. L. Ry. Co. v. Hall*, Ind., 90 N. E. 498.

92. **Rape—Defenses.**—In an action for unlawfully detaining a woman against her will with intent to have carnal knowledge of her, it is no defense that her husband consented.—*Young v. Commonwealth*, Ky., 124 S. W. 312.

93. **Reformation of Instruments—Defenses.**—Where defendant agreed to sell his orchard as a whole to a purchaser procured by plaintiff, and not by the acre, in plaintiff's action for commissions, it would be idle to reform the contract by changing the description of the land therein by fractional sections, though it was incorrect, where, owing to a shortage in quantity, the purchaser refused to complete the sale.—*Van Loan v. Glaze*, Cal., 106 Pac. 250.

94. **Sales—Acceptance.**—Receipt of part of stock of goods ordered, and their retention without objection held not a waiver of the buyer's right to rescind for failure to deliver within the time fixed.—*Bamberger Bros. v. Burrows*, Iowa, 124 N. W. 333.

95.—**Action for Price.**—In an action for the price of machinery claimed to have been sold plaintiff individually, evidence of inquiries pending the negotiations as to defendant's financial standing, held admissible to show plaintiff's reliance on defendant's credit.—*Fentress v. Steele & Sons*, Va., 66 S. E. 870.

96.—**Breach by Purchaser.**—Where, on refusal of the purchaser to accept, the seller resold the machine, held that the purchaser would be liable for the balance of the price.—*MERCHANTS' NAT. BANK v. BRISCH*, Mo., 124 S. W. 76.

97.—**Breach of Warranty.**—A buyer who, in an action for the balance of the price, pleads breach of warranty and damages therefor, may not recover the partial payment made on the delivery of the goods.—*Erie City Iron Works v. Noble*, Tex., 124 S. W. 172.

98.—**Construction.**—If defendant only bought the lumber listed in a stock sheet, he could only be required to take the quantity of lumber of any particular dimension which was listed therein.—*Wm. Cameron & Co. v. Matthews*, Tex., 124 S. W. 192.

99. **Sheriffs and Constables—Custody of Property.**—Where goods are seized by a sheriff in detinuer, it is immaterial where they are kept, so long as they are kept safely by the officer

and ready to be delivered as the law might require.—*Carmichael v. United States Fidelity & Guaranty Co.*, Ala., 50 So. 1003.

100. **Street Railroads**—Duty to Use Gates or Bars.—Whether failure of a street car company to equip the cars with gates to prevent passengers from getting off on the side next to the parallel track is negligence is for the jury.—*Columbus Ry. Co. v. Asbell*, Ga., 66 S. E. 902.

101.—Injury to Animal on Track.—It is not necessary to stop or check an electric car when an animal is seen near the track, unless the circumstances indicate that the animal is likely to move onto the track.—*Mobile Light & R. Co. v. Mackay*, Ala., 50 So. 1035.

102. **Subrogation**—Mortgages.—Where a chattel mortgagor paid money in liquidation of the mortgage, the third mortgagee held not entitled to subrogate to the first mortgagee's rights as against the second mortgagee unpaid.—*Porter v. Title Guaranty & Surety Co.*, Idaho, 106 Pac. 299.

103. **Taxation**—Property of Telegraph Company.—The board of equalization, in determining the taxable value of a telegraph company's property, held not bound by the cost of reproducing the property with an allowance for deterioration.—*State v. Western Union Telegraph Co.*, Minn., 124 N. W. 380.

104.—Vessels.—A vessel may be assessed without reference to the home port or the residence of the principal owner or agent when it is put to such use as to impress it with a local character.—*North American Dredging Co. v. Taylor*, Wash., 106 Pac. 162.

105. **Telegraphs and Telephones**—Damages for Delayed Message.—A married woman, to whom a death message was delivered two days late, with the date changed, held entitled to recover for trouble attendant upon a journey in an effort to attend the funeral.—*McInturff v. Western Union Telegraph Co.*, Kan., 106 Pac. 282.

106.—Delayed Message.—In a suit for failure to promptly transmit and deliver a telegram, held that defendant should be confined to the facts pleaded in a special plea as to how a mistake could have occurred.—*Western Union Telegraph Co. v. Bennett*, Tex., 124 S. W. 151.

107. **Tenancy in Common**—Possession of Co-Tenant.—That possession of one tenant in common is the possession of all is not a defense for trespass by one tenant in common against one holding the actual possession and claiming the entire property.—*Brown v. Floyd*, Ala., 59 So. 995.

108. **Trespass**—Injury to Property.—One trespassing on the land of another by stationing and operating thereon for his own benefit an engine, is liable for the destruction of property by fire set by sparks emitted by the engine, irrespective of his negligence.—*Steger v. Barrett*, Tex., 124 S. W. 174.

109.—Parties.—A sole owner of a land or chattel cannot commit a trespass to recover their possession, although they are wrongfully withheld by having no claim or title.—*Brown v. Floyd*, Ala., 59 So. 995.

110. **Trusts**—Change of Trustee.—A change of trustee under deed held valid, in so far as to confer on the new trustee authority to convey the property in fee free from the claim of a remainderman who was not made a party to the proceedings for change.—*Vernoy v. Robinson*, Ga., 66 S. E. 928.

111.—Fraud of Trustee.—The holder of the legal title to property in trust for himself and third persons as members of a syndicate held not guilty of fraudulent concealment towards the third persons, and they could not sue him for money received from a broker procuring a purchaser.—*Heckscher v. Blanton*, Va., 66 S. E. 859.

112.—Rental Value of Property.—If a trustee fails to use ordinary care in making trust property produce income, he is liable for the reasonable rental value thereof, and where he uses ordinary and reasonable care in renting the property, he is only to be charged with the actual receipts, less proper and legitimate expenditures.—*Dillivan v. German Sav. Bank*, Iowa, 124 N. W. 350.

113.—Resulting Trust.—Those who are the equitable beneficial owners of a fund which has been invested by another in land, who has taken the legal title to himself, may sue for the land itself, or for the amount of money so converted, with interest thereon from the time of the conversion.—*McKee v. Downing*, Mo., 124 S. W. 7.

114. **Vendor and Purchaser**—Assignment of Lien.—The purchaser of notes reserving a vendor's lien, in due course of trade before maturity and for a valuable consideration, without notice of a parol dedication of a part of the land by the maker, will be protected as an innocent purchaser as against such dedication.—*Adue & Lobit v. Town of La Porte*, Tex., 124 S. W. 134.

115.—Performance.—A purchaser may refuse to take a less acreage of land than that which the vendor agreed to sell him, if the sale was made by the acre.—*Van Loan v. Glaze*, Cal., 106 Pac. 250.

116.—Representations.—A vendor held bound by representation as to value of land sold, made as a statement of fact to an ignorant purchaser, relying thereon to the vendor's knowledge.—*Bolts v. O'Connor*, Ind., 90 N. E. 496.

117. **Water and Water Courses**—Contracts Creating.—Contracts made by the owner of placer mining property worked by means of water brought from a stream construed, and held to grant an easement to the owner of the quartz mills above on the stream to flow the tailings from said mills through the reservoirs and pipes of the grantor upon its property which was valid as against a subsequent purchaser.—*Schwab v. Smuggler-Union Mining Co.*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 305.

118. **Weapons**—Carrying Concealed Weapons.—The defense that accused carried a concealed weapon because he had been threatened with great bodily harm, or had good reason to carry it in the necessary defense of his person or property, is affirmative, and the burden is on him to prove it.—*State v. Reed*, Mo., 124 S. W. 55.

119. **Wills**—Construction.—That construction of a will which the state of testator's domicile has adopted must control, where personality is attempted to be distributed in a state other than his domicile.—*Rackemann v. Taylor*, Mass., 99 N. E. 552.

120.—Construction.—The phrase "die leaving no children or descendants surviving him" is a "nil" leaving what would otherwise be a fee simple, as to make it a defeasible fee, dependent upon whether the holder died without child or descendants surviving him.—*Daniel v. Lipscomb*, Va., 66 S. E. 850.

121.—Devise to Class.—Where a gift is to devisees nominated, the particular share they shall receive being mentioned, it is deemed to constitute a gift individually as tenants in common and not to a class.—*In re Murphy's Estate*, Cal., 106 Pac. 230.

122. **Witnesses**—Conspiracy.—Under Ballinger's Ann. Codes & St. secs. 5994, 7098, held, that a wife may not testify against her husband on a prosecution against him for arson though the property burned belonged to her.—*State v. Kephart*, Wash., 106 Pac. 165.

123.—Competency of Wife.—At common law and under Rev. St. 1899, sec. 4656 (Ann. St. 1906, p. 2536), a widow in a suit between strangers held entitled to testify to conversations between the deceased husband and a third person under whom a party to the suit claims, had in her presence.—*Brown v. Patterson*, Mo., 124 S. W. 1.

124.—Illustrating Testimony.—Use of blackboard and chalk to illustrate testimony cannot be commended.—*State v. Cottrell*, Wash., 106 Pac. 179.

125.—Right to Discredit Own Witness.—A party held not entitled, for the purpose of discrediting his witness, to inquire whether he had had a conversation with third persons in reference to the subject matter of his testimony.—*Davis v. Anderson*, Ala., 50 So. 1002.

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THE FOOTHOLD OF A FOREIGN CORPORATION GIVEN BY FOURTEENTH AMENDMENT.

The advance of federal power into the mainland of state control seems like the tide which drove King Canute back from the boundary his impotent command had defined.

It was but yesterday the federal Supreme Court held, that a corporation engaged in interstate commerce could not have the doing by it of local traffic conditioned upon its paying for that privilege a sum ascertainable by a percentage upon its total capitalization, or upon property located beyond the borders of the enacting state. *W. U. Tel. Co. v. Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 70 Cent. L. J. 109, 199.

This decision went upon the theory of such a condition being a direct burden upon interstate commerce and the constitutional clause as to that making the statute attempting to impose it unconstitutional.

Since then we have seen the federal tide sweep on and drown state comity by a kind of lunar influence in the Fourteenth Amendment.

Offhand it is somewhat hard to imagine any possible connection between privileges accorded by comity and equal rights secured by the Fourteenth Amendment. When we had finished reading a late opinion by Mr. Justice Day, speaking for a majority of the court, we began to wonder at the *rationalc* of the adjudged connection. *Southern R. Co. v. Greene*, 30 Sup. Ct. 287.

It is true we read the concurring opinion of Justice White in the *Western Union* case, in which he planted himself on the principle, that it was confiscatory to charge a corporation more for the privilege of doing local business than it could afford to pay, where the corporation was there already as engaged in interstate business and had invested in property whose value would

be greatly destroyed. But no one seemed to agree with him in that contention, and it seemed to us that the foothold idea, if it may be so designated, based on comity, had but a single advocate upon the supreme bench.

But we were mistaken, and it seems now that the learned justice was foreshadowing a more far-reaching principle than the necessities of the *Western Union* case required him to state. In that case he only contended that a corporation, having the right to go into a state for the purpose of engaging in interstate business, was immune from an exaction confiscatory in its nature as to property there already, as the price of doing local business. The principle laid down in the *Greene* case seems much broader than that, and the fact that the foreign corporation in whose favor it was announced was also one engaged in interstate commerce was immaterial.

The *Greene* case holds that, where a foreign corporation has come into a state in compliance with its laws and there acquired property of a fixed and, permanent character, and has subjected itself to the jurisdiction of the courts of the state, it stands to such state like an individual, whose rights are protected by the Fourteenth Amendment, so that they are subject only to the same rule of taxation as domestic corporations exercising the same privileges.

Justice Day says: "It is sufficient for the present purpose to say that we are not dealing with a corporation seeking admission into the state of Alabama, nor with one which has a limited license, which it seeks to renew, to do business in that state; nor with one which has come into the state upon conditions which it has since violated. In the case at bar we have a corporation which has come into and is doing business within the state of Alabama, with the permission of the state, and under the sanction of its laws and has established therein a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property, which the foreign corporation has acquired under the

permission and sanction of the laws of the state."

From the fact of the state extending to such a visitor such abundant privilege, the supreme court deduces that it has in some sense become estopped from considering it as a mere visitor, while, if its graciousness and courtesy had not been so greatly extended and utilized, the Fourteenth Amendment would not give it a sort of duplicate residence.

This situation may not bear a necessary resemblance, or portend a similar consequence, to that of the peasant carrying the frozen snake to his hearth and being bitten, but, at least, that fable was intended to inculcate the lesson that hospitality sacrificed no essential rights, and assertion by a beneficiary, to the injury of a benefactor, was without any color of right. The supreme court says, in effect, if a state indicates a foreigner is *persona grata* and loads him with favors,—making him fat with privilege—and treats him like a prodigal child, it adopts him into its family, while it may only continue to cuff and kick another foreigner, if its course in that respect is consistent.

But the distinctly singular concept that brings the favored foreign corporation to the attitude of a "person" under the Fourteenth Amendment, with equal rights to be protected like those of a natural person, is its establishment, because of prior favor, of "a business of a permanent character, requiring for its prosecution a large amount of fixed and permanent property." It seems to be distinctly conveyed that no other foreign corporation would be thus protected.

Certainly between natural persons no classification of this kind could be claimed under this Amendment. Equal rights as to a dollar are as sacred as to a million. Equal rights in misdemeanor matters are as inviolable as those in felony. Property localized, therefore possesses no relation to the claim of equal rights under the Amendment. Therefore, whether a corporation has acquired property as the result of comity which can be withdrawn at any time, if it is

comity, its possessor should acquire no peculiar rights.

The decision, however, seems one that will make the entrance of federal power into the domestic affairs of states not a remote possibility, but a most probable result. That it is a menacing situation needs not that the right is in the hands of an unfriendly power. That the state can be thus called to time as to its treatment of corporations, which it has the unquestioned—yet unquestioned—right to exclude, is of no light moment. Its free comity is to be vised, supervised and controlled, and what the state does in the way of making acceptance of comity work no hurt to its citizens is to be called "jurisdiction," twisted around to a right, under the federal constitution, in favor of, instead of against, those at whom it is aimed.

NOTES OF IMPORTANT DECISIONS.

CONTRACT—EXCEPTION TO THE RULE EX TURPI CAUSA NON ORITUR ACTIO.—A late case in the California Court of Appeals rejects the theory that one duped into a plan pretendedly designed to swindle others, but really organized to swindle him, has a right of action against his pretended confederates. *Schmitt v. Gibson*, 107 Pac. 571.

What are known in this section of country as the "Footrace Cases" are *Stewart v. Wright*, 147 Fed. 321, 77 C. C. A. 499, and *Hobbs v. Boatright*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. Of like kind among recent cases are *Faulkenberg v. Allen*, 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494, and *Lockman v. Cobb*, 77 Ark. 279, 91 S. W. 546.

The "footrace cases" did not decide, as we interpret them, that the dupe had an absolute right of action, but rather that public policy would tolerate a suit by him, because he, as to them, was not strictly in *pari delicto*. Judge Sanborn entered a vigorous dissent in the federal case, apparently on the idea that there existed no well grounded exception for courts coming to the aid of a swindler whose attitude was slightly less reprehensible than his supposed confederates.

Much may be said on both sides of this question, but possibly the best basis for a right of action lies in the fact that the dupe's attempt

to swindle might be considered never to have amounted to more than intent, with no strictly overt act in furtherance thereof. He thinks he is advancing the intent, but he really never is. His placing money in the hands of his supposed confederates is merely a mistake induced by a fraudulent representation, and it concerns the law in no wise that it is in pursuance to a desire to join in a scheme to swindle outsiders when the purpose exists in no other mind than his own. On this theory the locus poenitentiae could have no cessation or disappearance by the happenings of a fake fight. If it exists before the fight, it continues to exist. The supposed confederates could not by carrying out the real swindle destroy it.

This much is said by way of our claim that California court fails to distinguish the footrace cases. We have always understood the *pari delicto* rule to mean that two or more are participants in the same wrong. But that does not describe a dupe, who is duped because of his evil intention. His wrong is in entertaining a desire to do some third party a wrong, while the other fellows, with whom he thinks he is acting in concert, are actually perpetrating a similar, but not the same, wrong. The *ex turpi causa* principle does not apply, because strictly the money the dupe releases does not go, though so intended, towards the accomplishment of any bad purpose he has in mind, but it is just as if it were forcibly taken from him by the others, at least this so appears to us.

CRIMINAL LAW—THE PHILIPPINE SYSTEM ALLOWING SUPREME COURT TO FIND APPELLANT GUILTY OF HIGHER OFFENSE.—The case of *Pendleton v. United States*, 30 Sup. Ct. 315, brings to mind and reaffirms a ruling evidencing a blotch on American legislation—the case of *Trono v. United States*, 199 U. S. 521.

Both of these cases are Philippine cases, the earlier one holding that the Supreme Court of the Philippine Islands had the right, on defendant's appeal, to reverse a judgment for assault and render a judgment for homicide. The later case says that the earlier one "declares the relation of the courts and the scheme of procedure existing in the Philippine Islands, and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial court of first instance, and which was not repeated in Supreme Court, is not a ground of legal complaint."

The Supreme Court tries a case on the rec-

ord and does not have before it, as counsel for appellant says, "the supremely human element—the appearance of the witnesses and their manner on the stand." We have been excusing ourselves for taking over those "little brown men" by prating about our duty to civilize them and gradually to prepare them for self-government, and by way of helping them along we commission a lot of Americans to try them on dry transcripts, and, if they deem it advisable, reverse judgments rendered in a trial where there is confrontation of accused, in a hearing where there is only evidence of a confrontation. This puts on our plea of salutary pupilage and civilizing influence a sort of bar sinister, and lifts the skirts of pretense to expose the cloven foot of commercial exploitation, proven not to be worth the candle.

BANKRUPTCY—CORPORATION ENGAGED PRINCIPALLY IN MANUFACTURING.—It was lately decided by the U. S. Supreme Court that a corporation whose principal business is making and constructing arches, walls and abutments, bridges, buildings, etc., out of concrete is a corporation engaged principally in manufacturing, and as such entitled to the benefits of bankruptcy, or subject to be adjudged an involuntary bankrupt, this decision reversing the Third Circuit Court of Appeals, which had affirmed the district court. *Friday v. Hall & Kaul Co.*, 30 Sup. Ct. 261.

It was conceded that making concrete blocks and supplying them to others, is to be engaged as a manufacturer, but it was claimed that building a structure out of material prepared on the ground is not such, and the one so doing is engaged in the business of a builder, and not a manufacturer.

Justice Lurton, speaking for the entire bench, thus replies to this contention:

"The production of concrete arches or piers or abutments is the result of successive steps. The combination of raw material—the sand, the limestone, the cement, and the water—produced a product which undoubtedly was 'manufactured.' This concrete had then to be given shape. That required the manufacture of moulds, which remain in place until hardening occurs. If the concrete is reinforced, as is the case where great strength is required, then the adjustment of the bars of steel within the moulds was another step. Do all of these steps, each a step in 'manufacturing,' cease to be 'manufacturing' because the moulds into which the concrete is poured, when in a fluid state, are upon the spot where the finished product is to remain? That the operation of making and shaping the con-

crete is done at the place used seems rather a matter of convenience, due to the quick hardening in moulds and difficulties of transportation. But, as we may take notice, the operation which, in the end, is to produce an arch or abutment or pier or house, is not necessarily a single operation, but one of successive repetitions of the process. The business is not identical with that of a mere builder or constructor, who puts together the brick or stone or wood or iron, as finished by another. If the builder made his brick, shaped his timbers, and joined them all together, he would plainly be a manufacturer as well as a builder; and if the former was the principal part of the business, he would be within the definition of the bankrupt act. To say that one who makes, and then gives form and shape to the product made, is not engaged in manufacturing because he makes his product and gives it form and shape in the place where it is to remain, is too narrow a construction."

The bankruptcy statute might have included corporations principally engaged in building operations, just as it did those so engaged in "manufacturing, trading, publishing, mining or mercantile pursuits," but it did not. In all ordinary speech and contemplation contractors who engage to construct bridges, piers, etc., are builders, whether what they build is out of wood, stone, or concrete. The material out of which a bridge, pier, house or wall is made differentiates them in no sense as buildings. Getting the material to go into the structure is a detail. It seems to us the court has amended the statute, for it seems the corporation was solely engaged in building "pursuits."

On the same day, the same justice writing the opinion, the court held a corporation engaged in conducting hotels at various points and maintaining stores along with its hotels in a thinly-settled mountainous region, was not principally engaged in trading or mercantile pursuits. *Toxaway Hotel Co. v. Smathey.* 30 Sup. Ct. 263. We believe that decision right, but that it would have been less a strain to declare the bankruptcy statute applicable to it than to the building company, for it at least was somewhat engaged in mercantile pursuits, and the building company was simply using more mortar than if it had been using brick or stone, and was solely engaged in a building "pursuit." That was its sole business.

"THEORY OF THE CASE"—WRECKER OF LAW.

I.

What is the hidden rock upon which the harmony and symmetry of the law has been wrecked? That the law is a wreck, there seems to be now no doubt. In the February number of the Green Bag, we are told by one hundred or more of America's prominent lawyers and teachers of law, that jurisprudence in this country has become a "jungle;" that the condition is "appalling," "foreboding," "deplorable," etc.; that the greatest "business risk is the legal risk," and more equally cheerful news. We of the bar have known this for years, but it has never before been roundly expressed and boldly handed down from high places. At the Universal Congress of Lawyers and Jurists, at the St. Louis World's Fair, 1904, we heard with admiration some of these same lawyers eulogize American law. Our American Bar Association has also been in the habit of regaling its members at annual meetings with tales of Twentieth Century progress; tales of "new principles," of "enlightened," "modern," jurisprudence; of "liberal construction" of pleadings, and of the elimination of "technicalities." One of our prominent deans has given us a work entitled "Two Hundred Years' Growth of American Law." But now all this is changed; our leaders are acknowledging publicly, what all knew privately, to be the fact.

But admitting all this, the big questions are, what has been the trouble? Who has led us into this jungle, this mud hole? How are we going to remove the evil until it has been pointed out? Who can do the pointing? Will the compilation proposed in the Green Bag effect a cure, or will it merely give us an additional encyclopedia, or digest, of which Judge Dillon says we already have too many? Will such a work be of benefit, unless its authors are able to diagnose the case, state the disease, and avoid it in their work? These and other similar questions are the most vital before the American bar to-day. Every lawyer ought to ponder them. Every lawyer ought to read that *Corpus Juris* article in the Green Bag.

The English lawyer is not an inhabitant of the jungle in which the American finds himself. How did we get there, and the Englishman not? Just in this way: In our effort to be "liberal," and to eliminate "technicality," we have injured the structure of our law; we have broken down its framework. In seeking to attain speedy justice, in our desire to let the parties fight the case out "on the merits," we have thrown to the winds the vital technics

of the law, and in doing so have failed of the very object for which we are striving. We have plunged ourselves into a veritable morass of technicality from which some of our ablest lawyers despair of rescue. But the remedy is in fact simple. It consists in adherence to a few fundamental principles, technical, indeed—technics must be so—but just, humane, enlightened. Disregard of these principles, in a mistaken effort to accord litigants a chance to get to "the merits" lands us just exactly where we are—in a jungle.

One of these fundamental principles which operates as strongly now as it did even in the Roman law, notwithstanding the endeavor of some of our American courts to ignore it, is *frustra probatur quod probatum non relevat*: It is vain to prove what is not alleged. It may to some sound presumptuous to state that the observance of this merely "remedial" maxim would go far toward clearing the jungle. Whether it so sounds or not, the statement is true and can be demonstrated to be so.

Violation of this maxim and its cognates leads to the "theory of the case" doctrine.

Frustra probatur requires that the evidence be limited by the pleadings. The "theory of the case" doctrine, on the other hand, permits a departure from the pleadings, allows the parties to become involved in controversies not embraced within the issues, and over which the court has no jurisdiction. This procedure is not only a grave injustice to the party who is thus dragged into a controversy he is not prepared to defend; but it is destructive of the greater interests of third parties, of the state, that is of the people at large, which interests, when understood, absolutely negative the supposed rights of the immediate litigants to waive their pleadings and plunge into a controversy not expressed in the pleadings.

The state is a party to all litigation, and as such party its interests are superior to those of the litigants. *Salus populi suprema lex*. It follows that, if the state prescribes pleadings, then the parties cannot, without its consent, waive the pleadings. The state will say to the parties, speaking from its superior position, "I did not agree to your waiver." "Non haec in foedera veni."

Now, does the state prescribe pleadings? Of course, "our code" says so, but we are not here limited by mere statutes—we are trying to answer the question on principle, that is, on maxims, which must underlie the statute, if the statute is to be enforced.

The state does prescribe pleadings. One of the objects of government—the big object—is the preservation of the public peace.

Look around you at the manifold activities of the state directed toward that end. The preservation of the peace means the settling, the determination of litigation. *Interest rei publicae, ut sit finis litium*. If, then, the state is interested in bringing litigation to an end and thus preserving peace, it must have means of knowing what it is that is being, or has been, litigated. The means the state adopts to this end must be a permanent record, must be in writing—must in short be the "record proper," the "common law record," or the "mandatory record," which, of course, includes the pleadings. This record is the state's record, the record to which the whole public may go to find out, on questions of *res adjudicata* and collateral attack, what has been litigated. It is the only record available for purposes of *res adjudicata* and collateral attack. Anything beyond the pleadings is not *res adjudicata*. *State ex rel. v. Muench* (Lamm J.), 217 Mo. l. c. 138, 129 Am. St. Rep. 536, n: cases; *Munday v. Vail*, Lead. Cas. 79, Vol. 3 "Datum Posts," Hughes' Grounds & Rudiments; see, also, *id.*, Lead. Cac. 79a, 80, 81, 82, 83, 84 et seq. The bill of exceptions has no operation here. It is not the state's record. It is the parties' record, for purposes of their own personal, private appeal; and nothing else. We will discuss further the function of the bill of exceptions in a later article. Here it suffices to say that the bill of exceptions had no existence prior to the English statute of 1286, A. D. (See "Bill of Exceptions," 2 Hughes' Grounds & Rudiments, p. 397.) It is, therefore, perfectly evident that, prior to 1286 A. D., the courts of necessity confined themselves to the state's record in determining questions of *res adjudicata* and collateral attack. This necessitated that the issues be covered by the pleadings. Even today, there is, in most cases, no bill of exceptions, because there is no appeal. What was adjudged in such cases is easy of determination, because the state's record is the only one available. Now, can it be that in determining what is *res adjudicata* in two identical cases, in one of which the evidence is preserved, and in the other not, the court—the state—will adopt different methods? Must the state, in the first case, open the party's record, to see what matter in its own record they have attempted to waive, modify, or add to? If it must, then it is not possible to say what was decided in any case, even though the state has its own record of it, unless the evidence be preserved to show how far the parties have undertaken to depart from the pleadings, and to establish variance and departures. This would be absurd.

Thus, *res adjudicata* is simple. Read the

pleadings and you have it. And yet, into such a jungly condition has the subject of res adjudicata come in some of our states that a well known jurist was recently heard to declare from the bench, in the midst of a discussion by counsel, that he has studied res adjudicata all his life, and never had been able to understand it. No wonder. Until we understand our records and their philosophies, we will remain denizens of the legal jungle we have created. When its philosophy is lost the law is lost.*

EDWARD D'ARCY.

St. Louis, Mo.

*Editor's Note: This is the first of a series of articles on our troubled jurisprudence. The next article will present some specific illustrations of the "theory of the case" doctrine. Missouri and Illinois cases will be selected as examples of the conditions not only in those, but in most of the other states. It will be shown that the "theory of the case" is not merely a rule of practice, but that it affects "substantive" rights. The third article will deal with the "theory of the case" principle as exhibited in the Chicago Municipal Court Act.

without assistance from the executive or legislative branches. The Arizona court in the case above mentioned did but apply the rule laid down in the decisions affecting the rights of public service corporations, such as water, gas, telephone and railroad companies.

Judicial Regulation of Rates in the Absence of Statutory Regulations.—In Salt River Valley Canal Co. v. Nelssen, the court says: "Appellant contends that the fixing of a rate for the rendition of services of a public corporation is a legislative act and not judicial. It is necessary to apply a distinction which we may accurately make by adopting the language of the Supreme Court of the United States in Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.² "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act." The court did not seek to fix a rate for future service by appellant, but exercised jurisdiction to determine whether the rate was unreasonably high which had been collected by appellant from Nelssen for service for water, pending a final judgment, which rate was paid by Nelssen under an order of the court, and, therefore, presumably without acquiescence in the amount thereof. A public corporation does not enjoy its franchise solely for the benefit of its promoters or stockholders. While it uses its franchise there rests upon it a duty to render to the public, at reasonable rates, the services for which it was created.³

Even in states where rates are regulated both by constitution and statute, the subject has been considered by the courts. In a Colorado case,⁴ Helm, J., says: "Were the constitution and statutes absolutely silent as to the amount of the charge for transpor-

(2) 167 U. S. 479, 499, 42 L. Ed. 243, 253, 17 Sup. Ct. 896, 900.

(3) Munn v. Illinois, 94 U. S. 113, 126, 134, 24 L. Ed. 77, 84, 87, 12 L. R. A. (N. S.) 711; 6 C. L. 1873; Mills Irr. Man., pp. 150-1.

(4) Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

JUDICIAL REGULATION OF RATES CHARGED BY IRRIGATION COMPANIES IN THE ABSENCE OF STATUTORY PROVISIONS.

Doubtless owing to the general regulation by constitutions and statutes, of rates to be charged for the carriage of water by irrigation companies there is to be found but one case in which this rate has been judicially regulated. This case is the Salt River Valley Canal Co. v. Peter Nelssen.¹ This and analogous cases show the strong tendency by the courts in the arid and semi-arid states, to curb the efforts on the part of certain irrigation companies to take advantage of the necessities of the people living in these states, to exact an unreasonable tribute for the use of water; and for many years the courts alone stood between the West's water resources and the gangs of greedy speculators, fighting single-handed

(1) (Ariz.), 85 Pac. 117, (1906).

tation and the time and manner of its collection, there would be strong legal ground for the position that the demand in these respects must be reasonable. The carrier voluntarily engages in the enterprise. It has in most instances, from the nature of things, a monopoly of the business along the lines of its canal. Its vocation, together with the use of its property, are closely allied to the public interests. Its conduct in connection therewith materially affects the community at large. It is, I think, charged with what the decisions terms a 'public duty or trust.' In the *absence of legislation on the subject*, it would for these reasons be held at common law, to have submitted itself to a reasonable control, invoked and exercised for the common good, in the matter of regulations and charges; and an attempt to use its monopoly for the purpose of coercing compliance with unreasonable and extortionate demands would lay the foundation for judicial interference." In a California case, decided in the federal court,⁵ it was held that if the board of supervisors fix unreasonable rates, under the California statute, the complaining party could appeal to the proper court, which would, if it found the rates to be unreasonable, annul the existing rates and the question again remitted to the supervisors.

Determining What Is a Reasonable Charge for Services.—In the Salt River Valley Canal Co. v. Nelssen case,⁶ the court says on this point: "In determining what is a reasonable price to be charged for services by a public corporation, an examination must not only be made from the point of view of the corporation, but from that of the one served also. A reasonable rate is not one ascertained solely from considering the bearing of the facts upon the profits of the corporation. The effect of the rate upon persons to whom services are to be rendered, is a deep concern in fixing thereof, as is the effect upon the stockholders or bondholders. A reasonable rate is the one

that is as fair as possible to all whose interests are involved."

In Covington & L. Turnp. Road Co. v. Sanford,⁷ the Supreme Court of the United States had under consideration the question what was a reasonable toll to be charged by a turnpike company. The court said: "It cannot be said that corporation is entitled as of right, and without reference to the interests of the public, to realize a given per cent on its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interest are to be considered. The rights of the public are not to be ignored. It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public * * * the public cannot properly be subjected to unreasonable rates in order simply that the stockholders may earn dividends. * * * * If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it, and them which the constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon the payment of such tolls as, in view of the nature and value of the services rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable."⁸

Definition.—"In using the expression 'value of services rendered,' we must understand that the word 'value' is to the persons to whom the service is rendered."⁹

In San Diego Land & Town Co. v. Jasper,¹⁰ the following elements were consid-

(7) 164 U. S. 578, 596, 41 L. Ed. 560, 567, 17 Sup. Ct. 198, 205.

(8) See also Smyth v. Ames, 169 U. S. 466, 544.

(9) Salt River Valley Canal Co. v. Peter Nelssen, 85 Pac. 117.

(10) 189 U. S. 439, 47 L. Ed. 892, 23 Sup. Ct. 571.

(5) Lanning v. Osborne, 76 Fed. 319, affirmed 178 U. S. 22.

(6) Supra.

ered in determining what were reasonable rates: Depreciation in value of an irrigation plant and in the value of the services rendered to customers due to a diminution of the water supply from a long-continued drought from which the surrounding country has suffered since the passage of an ordinance regulating water rates. The valuation of an irrigation plant for purposes of taxation may be considered by the courts in determining the reasonableness of water rates as fixed by a board of supervisors—especially where the valuation was sworn to by officers of the company. The price which an irrigation plant brought on foreclosure is evidence which a board of supervisors, when regulating water rates, may take into consideration in estimating the value of the plant, on which the water company is entitled to a fair return from its rates.

JOHN E. ETHELL.

Colorado Springs, Colo.

NEGLIGENCE—RES IPSA LOQUITUR.

JOYCE v. BLACK.

Supreme Court of Pennsylvania, January 3, 1910.

The mere fact that an ornamental bracket fell from a building injuring a person does not raise the presumption of negligence, and the rule res ipsa loquitur does not apply.

At the trial when John P. Brennen, a witness for plaintiff, was on the stand, he was asked this question: "Q. I ask you whether or not, when you examined it that day you noticed that there was anything to hold it up in the way of fastening it to the front of this building? (Objected to by counsel for the defendant, the witness having already been asked that question, which was objected to, and in the light of his testimony and what he could testify to, it was sustained. It assumes that there ought to have been some fastenings there.) The Court: That is a proper assumption in one respect. Mr. Brennen: I am asking how it was fastened and what it was fastened with, if anything. Mr. Shaw: That is what he says he does not know. (Objection sustained. Exception to plaintiff.)"

Daniel F. Crawford was asked this question: "Q. Without stating how it was fastened, state

why you say you are able to tell how it was fastened, from having examined this place five months after the bracket fell down? A. In all things pertaining to building, I have gained considerable knowledge from tearing down old places, remodeling old fronts and making them new. They all have signs showing how it was constructed. In that way we know how to take our bearings. They generally leave some mark to work by. In that way I know what to expect when I start to tear out or build up. Mr. Brennen: Q. In other words, every building is built on a design, all designs leading into the same result? A. Yes, sir; we can tell what is an ornament that holds something—what is an ornament that was put there to hold something. They all show you how they were put on and how we are to get them off. Q. And, does it show, also, how they were held in place? A. Yes, sir; I have taken similar fronts to this out, and replaced them with modern fronts. The Court: Q. Are you able to state from what you saw positively how that was fastened, or are you simply able to give an opinion how it was fastened? A. To give an opinion how it was fastened. (Objection sustained and exception noted to plaintiff.) Mr. Crawford: Q. I understood you to say yesterday that you had frequently seen this building and this front? A. Yes, sir. Q. And I now ask you if you can state, as a matter of fact, how that cornice or bracket was held on the front of that building? A. I can answer. Q. How was it held? (Objected to by counsel for defense, as the witness did not see the bracket or cornice until five months after the accident.) Q. Did you see it before this accident? A. I saw the building before this accident. Q. Well, the front of the building? A. Yes, sir. The Court: The witness has testified that his first examination was five months afterwards, although he had seen it frequently before, but he never made any examination until five months after the accident. We will sustain the objection and note an exception to the plaintiff. Mr. Crawford: Q. From your examination of that building in November after this accident, could you not as well tell how that bracket was attached to that frame and held in place as if you had seen it half an hour afterwards? A. Yes, sir. Q. Or prior, to its falling out? A. I could tell the manner and mode of construction and what they depended on to hold it there, by looking at it, because I know the way they do it. Q. How was this one done? Was it done in the same way that others of that kind are? (Objected to by counsel for defense, as the same question. Objection sustained.)"

F. J. Osterling, an architect, was asked this question: "Q. When you worked on the building, did you also look at the bracket when you were fixing the building up? A. Yes, sir; looked at it in a general way. Q. Mr. Osterling, your office was close by this building, was it not, for a number of years? A. Yes, sir; I had an office in the building adjoining this one at one time. Q. And from that will you state whether or not you had any knowledge from the fact that your office was close by, and that you have remodeled this very front and your examination of it at that time, can you say how that bracket was held at that time? Can you tell, that is the question. Mr. Shaw: I have no objection to the witness saying whether he can express an opinion or not, but I object, as incompetent and irrelevant, to the witness basing his opinion upon an examination made five or six months after the accident. The Court: He can answer yes or no to that question. Just answer it yes or no, or with any qualifications you may wish; but do not state your opinion until we come up to that question. A. Yes, I can. Mr. Brennen: Q. Now, I ask you how it was held? (Objected to by counsel for defendant, as incompetent and irrelevant. Objection sustained.) Mr. Osterling: Q. Tell us how that bracket or cornice was held in place on the front of this building, over the door on the left-hand side as you go in the door going upstairs. (Objected to by counsel for defendant, as incompetent and irrelevant. Objection sustained.)"

The court entered a compulsory nonsuit, which it subsequently refused to take off.

BROWN, J.: On the evening of June 8, 1906, the appellant was sitting on a chair on the pavement in front of a building No. 602 Liberty avenue, Pittsburgh. While sitting close to this building and near the adjoining one—No. 600—an ornamental bracket from that building fell and struck him, and this suit is for the recovery of damages for the injuries sustained, due, as is alleged, to the failure of the appellee to have the bracket properly and safely fastened to the building. The learned trial judge properly refused to sustain the contention that the fall of the bracket was in itself evidence of negligence. There was no negligence in having the bracket for ornamental use on the front of the house, and its mere fall raised no presumption that it would not have fallen except for the negligence of the owner of the property in not having it safely attached to the building. The rule *res ipsa loquitur* is not in the case, and affirmative proof by the appellant of the appellee's negligence was essential to a recovery. Such

proof might have been submitted, but by the exclusion of the offers which are the subjects of the third, fifth, sixth, seventh, eighth, and ninth assignments of error the appellant was not permitted to lay a foundation for the support of his charge of negligence. John P. Brennen, assistant superintendent of the bureau of building inspection for the city of Pittsburgh, examined the front of the building about five months after the bracket fell. He testified that he had passed the building almost daily from the time the accident occurred up to the day he made the examination, and there was no change whatever at the point from which the bracket fell. He was then asked whether when he examined the building he found there had been anything to hold up the bracket and fasten it to the building, but was not permitted to answer. D. F. Crawford, a contractor and builder, who also examined the building about the same time as Brennen, testified that he could see the way in which the bracket had been attached, but when asked to tell how, his answer was excluded. F. J. Osterling, an architect, and third witness, who had examined the building, was asked whether, from his examination of it, he could say how the bracket had been held, but he, too, was not permitted to answer. The reason given for not permitting these three witnesses to answer was that their examination of the building had been made five months after the accident, but the court evidently overlooked the testimony of Brennen that he had passed the property almost daily from June until December, and that there had been no change in the front of it at the point where the bracket had been attached. In addition to this, though called after the foregoing three witnesses, Samuel W. Black, the appellee's agent in charge of the building, stated that from June to December there had been no change in the front of the building at the point stated. Under this state of facts Brennen, Crawford, and Osterling were qualified to tell the jury how the bracket had been attached, and this would have been the first particular in the proofs required from the plaintiff to establish his allegation of negligence.

After having shown how the bracket had been attached, it would have been competent for the appellant, if able to do so, to submit proof that the way in which it had been attached and maintained was improper and unsafe, rendering it liable to fall at any time, and that the owner of the building so knew or ought to have so known. He might not have been able to come up to this measure of proof, but it was his right to have the opportunity to do so, if he could, and that right

was taken away from him when he was not allowed to take the first step towards it.

The third, fifth, sixth, seventh, eighth, and ninth assignments of error are sustained, and the judgment is reversed with a *procedendo*.

NOTE.—*The Rule Res Ipsa Loquitur as Regards Material Falling from Structures Over or Abutting Streets.*—The principal case is so very much opposed to authority, that the ruling made appears to have deserved something more than a bald declaration. It is not based on any theory of the want of any contractual relation, but impliedly admits, that, if a presumption of negligence had existed, that would have constituted a tort permitting recovery. The following cases show that the rule of responsibility and presumption has been applied in cases where material falling down has caused injury, whether it was a part of or attached to the building or not.

In *McHarge v. Newcomer*, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298, it was said an awning insecurely fastened is intrinsically dangerous and, if it falls and injures a pedestrian lawfully on the street, "there is a presumption of negligence upon the part of the party maintaining the obstruction, which, if left unexplained, is sufficient to support a verdict in favor of the injured plaintiff."

And the rule of duty of the abutting owner of a building on a street has been thus stated as to a heavy sign on the front of a building: "The defendant was under a duty to the public to exercise common prudence to place and keep its sign in such position as not to endanger the safety of pedestrians on the street. As long as it performed that duty no injury would be inflicted, in the ordinary course of things. The happening of the accident is evidence, therefore, of the neglect of the duty, in the absence of proof that it happened out of the ordinary course." *St. Louis, I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, 12 L. R. A. 189.

In *Hearst's Chicago American v. Spiss*, 117 Ill. App. 436, evidence that a large sign was pulled away from the wall of a building by a wind of not unusual velocity, warranted the jury in finding it was not fastened or secured to the wall in such manner or by such means as to make it a reasonably safe or secure object to which to fasten guy ropes which, together with the wind, caused it to fall and injure plaintiff.

In *Gallagher v. Edison Ill. Co.*, 72 Mo. App. 576, the opinion says: "The next error relates to an instruction given by the court to the effect that the mere falling of the lamp 'in the absence of explanation' is inferential evidence that it was insufficiently secured against falling. The theory upon which this instruction is based is, that in the ordinary course of things a well-fastened electric lamp does not fall upon persons using the street over which it is suspended, hence in the absence of any other evidence as to the cause of its falling, a natural inference arises that it fell by some neglect or omission of duty on the part of the owner. But the application of this principle depends upon the particular facts of each case. There must be something in them which unexplained 'speaks for itself'—which

tends to show some neglect or omission of duty as the proximate cause of the accident." Then the court cites a number of cases of its application in behalf of a pedestrian on the street, and this instruction was sustained.

In *Dixon v. Pluns*, 98 Cal. 384, 33 Pac. 268, 20 L. R. A. 698, the action was by a pedestrian being struck by a chisel falling from a scaffolding above, on which defendant's employee was standing while repairing a cornice. It was contended the plaintiff was guilty of contributory negligence. The court said: "Upon the evidence we cannot say that the respondent was guilty of contributory negligence in walking upon the sidewalk at the time the injury was inflicted. She had a right to be there and had no sufficient reason to anticipate danger from overhead. Respondent's evidence also established a *prima facie* case of negligence upon the part of appellant. He was engaged with tools and materials directly over a thoroughfare where people were constantly traveling and had an undoubted right to travel. Under such circumstances the law demanded of him more than ordinary care. He was called upon to exercise the greatest care and caution in the performance of his work, in order that travelers might not be injured."

In *Knott v. McGilvray*, 124 Cal. 131, 56 Pac. 789, the above doctrine was applied to the case of a scantling falling to the sidewalk and killing a pedestrian. Still later it was held to cover the case of defendant's employee opening a trap door in a sidewalk and causing a passerby to fall therein. *Bowley v. Mangrum & Otter*, 3 Cal. App. 221, 84 Pac. 996.

In *Hughes v. Harbor & S. B. S. Assn.*, 115 N. Y. Supp. (App. Div.) the action was for an injury caused by a brick falling from the top of a building upon which a new roof was being placed because of a recent fire. The court said: "The cases of objects falling on pedestrians in public streets are the common ones for the application of the rule of *res ipsa loquitur*. The falling of the brick called for an explanation from the owner in possession and control. He attempted to meet that burden by shifting the responsibility on the so-called independent contractor, and now seeks to have the inference drawn that the brick was dislodged by the carelessness of workmen for whom said defendant owner was not responsible. * * * I think the reasonable inference is that the brick was in some way dislodged by the men at work on the roof; and for the purposes of this case it seems to me immaterial whether the immediate act of such workmen was negligent or not. The defendant owner employed a contractor to put a roof on the building and to set the roof beams in a wall which had been damaged by fire, without making any provision to repair or insure the safety of the wall or to protect pedestrians on the street."

The Court of Appeals of this state says: "It is a well-settled rule of law that, if a person erects a building, bridge or other structure, upon a city street or an ordinary highway he is under legal obligation to take reasonable care that nothing shall fall into the street and injure persons lawfully there. This being so, it is further assumed that buildings, bridges and other structures properly constructed do not ordinarily fall upon the wayfarer; so also if anything falls from them upon a person lawfully

passing along the street or highway, the accident is *prima facie* evidence of negligence, or, in other words, the presumption of negligence arises." Hogan v. Manhattan R. Co., 149 N. Y. 23, 43 N. E. 403.

This case concerned the falling of an iron bar from an elevated railway upon the driver of a coal cart. Two of the court dissented, but neither filed an opinion. Many cases in New York decided in Appellate Divisions of Supreme Court have enforced this ruling. Massachusetts Judicial Supreme Court cited the Hogan case as authority for holding that the falling of a pail of sand upon the head of plaintiff passing under a railroad bridge warranted a finding of negligence by the owner of the bridge. Lowne v. R. Co., 175 Mass. 166, 55 N. E. 825.

In Atchison v. Plunkett, 8 Kan. App. 308, 55 Pac. 677, the Kansas court refers to New York decision for the proposition that the law casts on owners of abutting buildings the duty to prevent them from being dangerous to passers on the street and it was ruled that the falling of a stone, suspended from a beam attached to an ice house, upon plaintiff standing on a street corner near the ice house raised a presumption of negligence.

We do not find any support, in our investigation, for the principal case, and it seems to us more just to apply the presumption rule to a case of its kind than in such instances as shown in the Hogan and Lowne cases. They were casual things arising out of management of property, while the proof in the principal case shows the existence of what was in the nature of a nuisance.

C.

JETSAM AND FLOTSAM.

THE JUVENILE COURT ACTS AND CHRISTIAN SCIENCE—ARE CHILDREN DEPRIVED OF MEDICAL ATTENTION "NEGLECTED" CHILDREN?

Christian Science is being attacked from another quarter. The Juvenile Court Acts, though apparently inoffensive, are the antagonists. Instead of prosecuting a Christian Science parent criminally for failing to provide medical attention for his children, the judge of the Juvenile Court requires the probation officer to bring the children into court as "neglected" children, and then disposes of them according to the facts of the case or on the promise of the parent no longer to neglect his child in the manner charged.

A recent decision by a juvenile court in Colorado in the case of People v. Messenger, is the occasion for referring to this question. The case arose before Judge McDaniel at La Junta, and his decision was handed down on March 21, 1910:

The defendant, Messenger, who was a Christian Scientist, and otherwise well fixed and of good moral character, had been summoned into the juvenile court, charged with "neglecting" his six children, all of whom had contracted diphtheria or pneumonia, and three of whom had already died at the time of the hearing, while the others were still sick.

In rendering his opinion finding the parents guilty as charged, the court rendered the following very careful and well considered opinion:

"The question for the court is whether or not under the evidence, these children are dependent or neglected children as defined in the statute.

The evidence of the people sufficiently disclosed the fact that the parents whose rights to the further custody of these children are in question, are of good moral character and maintain a home fitted in its material furnishings to their station in life, and that their treatment of their children in every respect is intelligent, kindly and considerate, so that the issue is narrowed to the question of whether or not the failure or refusal of the parents to give proper medical treatment and care to their children, Arthur Messenger, aged 12 years, alleged to be ill with diphtheria; Martha Messenger, aged 6 years, and Mabel Messenger, aged 2 1-2 years, alleged to have been exposed to diphtheria, and three others, alleged to have died from diphtheria, constitutes such 'neglect' as is contemplated by the statute.

"This proceeding is not criminal in character or purpose, and invokes the power of the court, under the statute and in the exercise of its power as *parens patriae*, solely to provide proper guardianship for dependent or neglected children.

"It may reasonably be apprehended that in the exercise of the very considerable powers granted the county and Juvenile courts by the later statutes of this state relating to children, occasional hasty and inconsiderate judgments may inflict injustices from which the slow and expensive processes of appeal afford inadequate relief. In view of the further fact that most of these cases are tried to the court without the intervention of a jury, it is essential that the courts be extremely careful to invade no rights of the parent which his conduct has not forfeited.

"On the other hand, it is to be remembered that these statutes afford a wide latitude to the exercise of the court's discretion in the disposition and subsequent control of the guardianship of children, to the end that their welfare may be best insured; that this is the primary purpose of these beneficent statutes; and that courts charged with their interpretation and enforcement should allow no consideration of sympathy, or private or neighborhood opinion, to interfere with the execution of this purpose.

"A parent or guardian having in his charge and custody a child of tender years, unable to provide for its own welfare, is in duty bound, when that child falls seriously ill, to procure for it the attention and care of those whose scientific knowledge of disease fits them to treat it, and that his failure to do so constitutes neglect.

"In the case at bar a much stronger case is made against the parents, than the abstract rule presents. * * *

"The failure to call a physician for Mary until the tenth day of her illness would seem to justify the charge of neglect, although the evidence does not show that the parents knew that her disease was diphtheria.

"But in the case of Arthur there is no question. Mary had died on January 26, of diphtheria, and the Messenger home was quarantined. On February 7 the physician called to inspect

the home and found Arthur ill with diphtheria, and was told he had been sick eight or ten days. When the officer of the State Board of Child and Animal Protection called, Messenger told him in emphatic terms that he had not and would not employ a physician. Drs. Farthing and Edwards testified that in their opinion, when called to attend Arthur, the chances were greatly against his recovery.

"There are some diseases in which the administration of medicine appears to be of doubtful efficacy, the physician's advice being needed only in the matter of diet, exercise and hygiene. In such diseases unless the need of such advice became apparent, the failure to call a physician could not be charged as neglect. But in a case of diphtheria, such as the case at bar, where the disease is so dangerous without treatment, and so amenable to treatment in its early stages, the duty to call a physician and to administer the special treatment as soon as the diagnosis is confirmed, is imperative.

"The court, therefore, finds that the said Arthur Messenger, Martha Messenger and Mabel Messenger, children of B. D. Messenger and Mrs. B. D. Messenger, are dependent and neglected children, as charged in the complaint herein and defined in the statute.

"It is the order of the court that, pending the final disposition of this case, the said children may be permitted to remain in their home and under the care and control of their parents, subject to the jurisdiction and direction of this court and to the visitation of any officer of this court when directed by the court to do."

CORRESPONDENCE.

REFORMING PROCEDURE BY ABOLISHING THE LAW.

Editor Central Law Journal:

The effort to reform court procedure, which of late has occupied a considerable share of public attention, and is a matter of not a little concern to judges and lawyers, seems to have settled, in some localities at least, as pointed out in 70 Central Law Journal, p. 52, on the substitution of judicial discretion for the application of the settled rules and principles of law. That such a course is a danger more grave than the present evils of delay and expense must be manifest to even the casual student of political economy, and that any judge or lawyer can view the present tendency without alarming forebodings would be unbelievable but for resolutions and other expressions of conventions and meetings brought about for the consideration of this very question.

That this idea had its inception in the disappointment of a political ambition and has been nurtured by trial judges out of a desire to continue a course now widely prevalent of determining litigation according to personal views of abstract justice or by dictates of prejudice or favoritism is not an altogether unfounded criticism, and the wonder is that it should have found favor with the public or with law-making body.

Appellate courts owe their creation to error in tribunals of first instance. Without error in trial courts there is no duty to be performed

by appellate judges. The "due process of law" provisions of constitutions have been held to contemplate something more than execution without judgment, or judgment without jurisdiction, or a trial without evidence or instructions, and yet either of these is as reasonable as a verdict rendered upon incompetent evidence or a misleading instruction or erroneous declaration of law. That the ultimate result of such erroneous procedure may not, in the opinion of a reviewing body, "affirmatively appear to have prejudicially affected the substantial rights of the party complaining," or that (in the same opinion) it appears "upon the whole record that substantial justice has been done" furnishes no ground for the encouragement of such an evil practice as must necessarily result from a failure to observe the settled rules of legal procedure. To affirm the judgments of trial courts upon such a theory is, in effect, to abolish the law and substitute therefor judicial discretion, which has been defined as "the most odious of all laws." State v. Cummings, 36 Mo. 263. Other definitions are given in Words and Phrases, vol. 3, p. 2069, among them that of Lord Camden, that, "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men. * * * At best it is often caprice. In the worst it is every vice, folly, and passion to which human nature can be liable."

That there is need of reform in the judicial procedure of the day may be conceded, but it will not be found in the perpetuation of error and the substitution of opinion for principle in the establishment of precedent, a change which must, from the very nature of the matter, result in many cases in a studied divergence from beaten paths to accommodate personal views of justice or abstract notions of right and wrong.

A close examination of the subject will disclose that negligence, carelessness, and ignorance combine to burden appellate courts with cases and their reports with reversals, and the lower courts with new trials. That the circuit courts of Missouri have not the time at their disposal for the proper consideration of cases is well known, and it will hardly be questioned that a large percentage of the appeals in this state are necessitated by that condition.

In the rural portions of the state justices of the peace and judges of county courts (?) and probate courts are not required to possess either a knowledge of the law or a common education. It is sufficient if they can read and write. Appeals from justices and from county and probate courts to the circuit court would be considerably lessened in number if the presiding officer at the first trial possessed the requisite qualifications for holding court. Such appeals now enlarge the business of the circuit court and to that extent aggravate the conditions which have become a cause of public complaint.

Appeals are expensive to litigants and laborious to counsel. There seems to be something lacking in a system which lays the penalty of this additional expense and labor on the client and lawyer and at the same time burdens the public to maintain numerous appellate courts whose work has been found insufficient and unsatisfactory. There is a palpable deficiency, too, in that condition which compels a litigant whose claim is small to begin his action in an incompetent court—a court which the statute of its creation does not contemplate as com-

petent to deal with even the most elementary law proposition. In general, it may be said, there is a prevailing disposition to sacrifice principle to the "amount involved," so that the wealthy litigant may have his case heard by successive appeals by four or more judges, while he who is not peculiarly able to appeal must be content with the decision of a single judge.

Manifestly, the remedy does not lie in the creation of additional higher courts. It should rather be sought and found in the elimination of error from trial procedure and the strict application of those settled rules and principles which have reduced the law to a science.

In our own state there is no longer a need of the primitive administration of justice by justices of the peace. Properly qualified judges of the county courts and probate courts, whose offices are already maintained, might, with enlarged jurisdiction dispose of all the business now transacted in justices' courts, and with less additional expense than is now required to supply justices of the peace with books, dockets, and blanks. Such county and probate judges, sitting as associate judges of the circuit court, might also exercise a helpful tendency toward the elimination of favoritism and prejudice, which, natural to the race, must unconsciously affect the rulings of that court in some cases.

An intermediate tribunal of one or more judges, before which a party as a prerequisite to appeal should be required to submit his record and make at least a *prima facie* showing of error, would, no doubt, protect the higher courts from appeals without merit.

Whether the above suggestions are found worthy of consideration or not, it must clearly appear to every student of present conditions, that reform looking to the elimination of error in courts of first instance is the greatest desideratum. The smaller the chances of reversal, the fewer will be the number of appeals, and the smaller the percentage of error the greater the service performed by judges of trial courts.

J. D. GUSTIN.

Salem, Mo.

ABOLISHMENT OF THE DEFENSE OF INSANITY.

Editor Central Law Journal:

The legislature of the state of Washington at its 1909 session enacted what was intended to be a complete criminal code, in which is the following:

"Sec. 7. Insanity, Idiocy, Imbecility, Criminal Propensity No Defense.

It shall be no defense to a person charged with the commission of a crime, that at the time of its commission, he was unable by reason of his insanity, idiocy or imbecility to comprehend the nature and quality of the act committed, or to understand that it was wrong; or that he was afflicted with a morbid propensity to commit prohibited acts; nor shall any testimony or other proof thereof be admitted in evidence."

The same Act Sec. 6 declares that voluntary intoxication shall be no defense, but allows proof thereof where a particular intent is a necessary element in the crime charged. This code is kinder to the drunkard than to the insane.

E. A. VINSONHALER.

Seattle, Wash., March 22, 1910.

[The legislature of Washington has permitted its indignation against the abuse of the

defense of insanity to lead it into doing itself a very foolish thing.

Nay, more, in order to wipe out one abuse, the legislature has created another abuse.

Still more, they have tried to do an impossible thing, to-wit, to set aside a landmark of law set up in the dim dawn of civilization and accredited by the consent of the ages that have intervened.

This is the land mark, to-wit: "*Actus non facit reum nisi meus sit rea.*" (Act and intent must concur to constitute crime).

This maxim is imbedded in the law. It lays at its foundation. It is foolish to think that a legislature is so all powerful that it can change such a law.

True it can pass a statute having the form of authority. But it cannot make that law which by the consensus of the ages is contrary to every principle of justice. Such a law is not law but anarchy and oppression.

This maxim is part of what Mr. Wm. T. Hughes, in his work on *Grounds and Rudiments of Law*, calls the "prescriptive constitution," which like the implied restrictions upon the English Parliament consist of those prominent landmarks set by the people themselves in all ages, and approved by universal consent, which no legislature can ignore with impunity.

The legislature in this particular case makes itself especially ridiculous in recognizing the maxim we have quoted to an extreme degree in the case of drunkenness and to have totally ignored it in that particular instance which first called it forth.

If a voluntary act like intoxication is recognized as affecting intent even greater indulgence should be extended to a condition absolutely involuntary and which from its nature

"Hard cases make bad law," so pronounced abuses lead legislatures to foolish extremes.

EDITOR.]

HUMOR OF THE LAW.

A Detroit judge the other day looked sharply at a woman who was before him asking for a divorce, and then said: "I recognize you. I gave you a divorce not quite three years ago. It was for cruelty. In less than a year you take up another man, marry him after a month's acquaintance, live with him two months, and then apply for another divorce. I won't hear your case. You'll have to go to some other judge." The woman went, and the other judge gave her the divorce. It seems that her second husband used to chase her with a shotgun when he got drunk—which was so often that there was hardly time to do the housework between Marathons.

Down in Sampson county, North Carolina, there is on file among the records of the Superior Court, a presentment by the grand jury to this effect: "The jurors for the state upon their oaths present that John Smith, late of the county of Sampson, did unlawfully and wilfully shoot, fight, fiddle and dance on the Sabbath day, against the form of the statute in such case made and provided, and against the peace and dignity of the state."—Law Notes.

WEEKLY DIGEST.

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1. Appeal and Error—Right of Review.—Where plaintiff takes a nonsuit because of a ruling which prevents recovery, he may have such ruling reviewed by an appeal from the judgment refusing to set aside the nonsuit.—*Ford v. Houston & T. C. R. Co., Tex.*, 124 S. W. 715.

2.—Time to Appeal.—The time for taking an appeal held extended by the court filing its finding pursuant to a request for a finding in order that specified questions not apparent on the record may be reviewed.—*Sparrow v. Bromage, Conn.*, 74 Atl. 1070.

3. Assignments—Rights Assignable.—An action for fraud practiced on a buyer by the seller and inducing the purchase is not assignable.—*Mullinax v. Lowry, Mo.*, 124 S. W. 572.

4.—Who May Sue.—At common law the assignee of a chose in action could not sue in his own name, though he may do so under the statute.—*Baumer v. Daeschler*, 120 N. Y. Supp. 957.

5. Bankruptcy—Fraudulent Conveyance of Stock.—In an action by a trustee in bankruptcy to recover certificates of stock fraudulently transferred to defendant, where recovery of the stock would be insufficient relief, judgment may be rendered against the transferee.—*Wasey v. Holbrook*, 120 N. Y. Supp. 675.

6. Banks and Banking—Deposits.—A bank held not required to apply a deposit to payment of the depositor's note held by it in the absence of demand.—*Guernsey v. Marks, Or.*, 106 Pac. 334.

7. Bills and Notes—Accommodation Maker.—An accommodation maker of a negotiable note, being primarily liable thereon, was not discharged by an extension of time to the principal debtor.—*Bradley Engineering & Mfg. Co. v. Heyburn, Wash.*, 106 Pac. 170.

8. Brokers—Commissions.—The fact that one who was employed to procure a purchaser of real estate violated his contract of employment with a third person engaged in the banking and real estate business did not defeat his right to recover his commission from the owner on procuring a purchaser.—*Pomarici v. Rosenblum*, 120 N. Y. Supp. 756.

9. Burglary—Nighttime.—In a prosecution for burglary in the nighttime, evidence held insufficient to show that the entering was not in the morning after daylight between 5:30 and 7:30.—*State v. Gunderson, Wash.*, 106 Pac. 194.

10. Carriers—Limited Liability Contract.—The acceptance of a receipt for a trunk, in which there is a special contract limiting the carrier's liability, does not constitute the contract.—*Morgan v. Woolverton*, 120 N. Y. Supp. 1008.

11. Charities—Authority to Borrow Money.—The mere appointment by a charitable institution governed by a board of trustees of a person as treasurer or as "business agent" or "business manager," would not give the appointee power to borrow money so as to bind the institution.—*Alton Mfg. Co. v. Garrett Biblical Institute, Ill.*, 90 N. E. 704.

12. Colleges and Universities—Religious Instruction.—Religious teaching and training in the doctrines represented by the mission are required to satisfy the condition on which such mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government.—*Lowrey v. Territory of Hawaii, U. S. S. C.*, 30 Sup. Ct. 209.

13. Confusion of Goods—Remedies.—A plaintiff in replevin may show by facts that defendant has taken his property and has commingled it with property of his own of the same nature and character, and by facts trace the possession thereof to defendant, and recover from the mass a quantity equal to the amount he owned.—*Nashville Lumber Co. v. Barefield, Ark.*, 124 S. W. 758.

14. Constitutional Law—Usurpation of Administrative Function by Courts.—The courts cannot under the guise of exerting judicial power usurp administrative functions by setting aside an order of the Interstate Commerce Commission.—*Interstate Commerce Commission v. Illinois Cent. R. Co., U. S. S. C.*, 30 Sup. Ct. 155.

15. Contracts—Assumption of Payment.—The assumption of payment of a judgment for taxes against a lot held to give a city the right to sue the purchaser personally for the debt.—*Toepperwein v. City of San Antonio, Tex.*, 124 S. W. 699.

16. Contribution—Joint Wrongdoers.—There is no apportionment of responsibility, and no right of contribution or indemnity between persons uniting in a tort.—*Sparrow v. Bromage, Conn.*, 74 Atl. 1070.

17. Corporations—Breach of Contract.—On breach of contracts with corporations whose capital stock is owned by a third, all three corporations cannot be joined in a single action for damages.—*New York Air Brake Co. v. International Steam Pump Co.*, 120 N. Y. Supp. 683.

18.—Officers' Liability to Corporation.—Whether the president of an insurance company willingly or unintentionally by culpable negligence, ostensibly received for its benefit

forged municipal bonds in exchange for stock, he is responsible to make good the default.—*Fidelity & Deposit Co. of Maryland v. Wise-man*, Tex., 124 S. W. 621.

19.—**Secret Profits.**—Subsequent bona fide purchasers of a corporation's preferred treasury stock for full cash value, without knowledge of secret profits, held entitled to recover the same in equity.—*Mason v. Carrothers*, Me., 74 Atl. 1030.

20.—**Title to Property.**—The title of a corporation to property beyond the amount authorized to be held by it is invalid as against the state, and the public authorities alone may take advantage thereof.—*Evangelical Baptist Benevolent & Missionary Society v. City of Boston*, Mass., 90 N. E. 572.

21.—**Ultra Vires.**—A corporation may plead the defense of ultra vires to a contract of suretyship when sued thereon by one having knowledge of the original relation of the parties.—*Bradley Engineering & Mfg. Co. v. Heyburn*, Wash., 106 Pac. 170.

22. **Criminal Evidence—Good Character.**—Evidence of good character is a species of circumstantial evidence to be considered the same as all other evidence, together with all the facts in the case; and, while it alone may cause a reasonable doubt, it does not necessarily do so.—*People v. Fisher*, 129 N. Y. Supp. 659.

23. **Criminal Law—Intent.**—While criminal intent will be presumed from the commission of an unlawful act, where a specific intent is necessary to crime, the intent must be proved.—*People v. Kathan*, 120 N. Y. Supp. 1096.

24. **Criminal Trial—Verdict of Guilty on One Count.**—A verdict of guilty on one count only of an indictment eliminates another count thereof, and error cannot be assigned upon any of the rulings of the court with reference to that count.—*People v. Well*, Ill., 90 N. E. 731.

25. **Damages—Breach of Contract.**—Where defendant granted to plaintiff a certain advertising privilege, for which a third party successfully asserted a superior title, defendant's liability in damages was the value of the privilege.—*May v. Poluhoff*, 120 N. Y. Supp. 827.

26.—**Liquidated Damages.**—A deposit made by a bidder for the erection of a public building for a city held liquidated damages, and not a penalty.—*Wheaton Building & Lumber Co. v. City of Boston*, Mass., 90 N. E. 598.

27. **Dedication—Acceptance.**—Evidence that a city has graded a street dedicated for a street shows acceptance of the dedication and the exercise of jurisdiction over the street.—*Scheffler v. City of Hardin*, Mo., 124 S. W. 569.

28. **Dismissal and Nonsumit—Want of Prosecution.**—Where plaintiff failed to prosecute a suit for seven years, during which time defendant died, a dismissal was warranted.—*Oehlhof v. Solomon*, 120 N. Y. 925.

29. **Electricity—Res Ipsa Loquitur.**—The doctrine of res ipsa loquitur held to apply in an action for injuries caused by coming in contact with a live electric light wire.—*Hebert v. Hudson River Electric Co.*, 120 N. Y. Supp. 672.

30. **Eminent Domain—Telephone Lines in Street.**—Where telephone lines are constructed in a street, the structure is an additional burden.—*Southwestern Telegraph & Telephone Co. v. Smithdeal*, Tex., 124 S. W. 627.

31. **Equity—Clean Hands.**—The maxim of clean hands applies solely to willful misconduct with reference to the matter in litigation.—*Mason v. Carrothers*, Me., 74 Atl. 1030.

32.—**Clean Hands.**—One applying to equity for relief cannot found his claim for relief solely on a beneficial provision in a contract which he has repudiated.—*Westwood v. Cole*, 120 N. Y. Supp. 884.

33. **Evidence—Parol Evidence.**—Parol evidence is admissible to show the real consideration of a written instrument.—*Karpf v. Bor-genicht*, 120 N. Y. Supp. 876.

34.—**Presumptions.**—One presumption cannot be made the basis of another presumption.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd*, Tex., 124 S. W. 738.

35.—**Presumption as to Receipt of Letter.**—The receipt of a letter will be presumed from proof that it was properly addressed, stamped, and mailed.—*Sills v. Burge*, Mo., 124 S. W. 605.

36.—**Uncertainty.**—A written contract is neither varied nor contradicted by parol testimony which merely makes certain that which the face of the contract leaves uncertain as to what the intention of the parties was.—*Montgomery & Co. v. Arkansas Cold Storage & Ice Co.*, Ark., 124 S. W. 768.

37. **Executors and Administrators—Jurisdiction of Probate Court.**—The probate court has jurisdiction to grant administration of estates to persons who at their decease are inhabitants or residents in the county, without proof that they left an estate to be administered within the county.—*Connors v. Cunard S. S. Co.*, Mass., 90 N. E. 601.

38.—**Liability of Surety.**—Where, under the terms of a will, it was the duty of an executor to turn rents and proceeds of sales of real estate over to a foreign executor, and he failed to do so, he and his sureties were liable for such sums.—*McIntire v. Mower*, Mass., 90 N. E. 567.

39. **Exemptions—Property and Rights Exempt.**—Under a constitutional provision exempting property to the value of \$500, a debtor may select as his share in a judgment owned by a firm of which he is a member.—*Farmers' Union Gin & Milling Co. v. Seitz*, Ark., 124 S. W. 780.

40. **Fire Insurance—Inventory.**—A clause in a fire policy covering a stock of merchandise that a set of books shall be kept by insured held complied with on insured producing invoices of goods covering all the goods purchased since the date of an inventory.—*Cincinnati Ins. Co. v. Rosenberg*, Del., 74 Atl. 1073.

41. **Food—Milk Adulteration.**—Where defendant was not only a vendor, but a producer, of milk, a sample from one of two cans from which he was selling milk was sufficient as proof of a violation of agricultural law prohibiting the selling of impure milk.—*People v. Bailey*, 120 N. Y. Supp. 618.

42. **Forgery—Indictment—Explanatory averments to explain the instrument set forth in an indictment for forgery are proper.**—*Chappel v. State*, Tex., 124 S. W. 657.

43.—**What Constitutes.**—One falsely representing to the maker of a note the loss thereof, and inducing him to execute a new note bearing the date of the original, and then passing the new note as the original, with intent to defraud,

is not guilty of forgery.—*People v. Pfeiffer*, Ill., 90 N. E. 680.

44. Fraud—Action for Damages.—It is not a condition precedent to a suit for damages for fraudulent representations as to the value of a horse traded to plaintiff that plaintiff should tender the horse to defendant; the action not being one for rescission of the contract.—*Covington v Sloan*, Tex., 124 S. W. 690.

45. Frauds, Statute of—Payment of Debt of Another.—Purchaser of business, assuming as part of consideration of a debt due to a third party, held liable as on an original undertaking.—*Ackley v. Skinner*, 120 N. Y. Supp. 1105.

46. Garnishment—Payment Before Service.—A garnishee having paid the debt before service held not entitled to recover the same from the debtor because the garnishee appeared and answered, admitting the indebtedness.—*Baughn v. J. B. McKee Co.*, Tex., 124 S. W. 732.

47. Hawkers and Peddlers—Sale of Theater Tickets.—The offering of theater tickets for sale does not constitute "hawking" and "peddling," so as to require a city license therefor.—*People v. Marks*, 120 N. Y. Supp. 1106.

48. Husband and Wife—Contracts.—Under Burns' Ann. St. 1908, secs. 7851-7853, a married woman held entitled to employ her husband to act as her agent in her business.—*Wasam v. Raben*, Ind., 90 N. E. 636.

49. Contract for Separate Maintenance.—Waiver of a wife of ground for divorce, with alimony, and her consent to return to her husband, held sufficient consideration for a contract with him for her separate maintenance, if she were again compelled to leave him.—*Hite v. Hite*, Ky., 124 S. W. 815.

50. Intoxicating Liquors—Remonstrances.—Where a remonstrance is filed against the granting of a liquor license in a ward of a city, the burden of proof is upon the remonstrators to show that they constitute a majority of the legal voters of the ward.—*Adams v. Smith*, Ind., 90 N. E. 625.

51. Judges—Civil Liability for Judicial Acts.—A judicial officer is not civilly liable for his judicial acts, whether negligently, willfully, or maliciously committed.—*Kruegel v. Cobb*, Tex., 120 S. W. 723.

52. Judgment—Parties.—Where two or more sue jointly for conversion, that the evidence shows title to be solely in one of the plaintiffs does not preclude judgment in favor of that one.—*Walker v. Lewis*, Mo., 120 S. W. 567.

53. Landlord and Tenant—Breach of Lease.—Where the landlord fails to furnish heat as required by the lease, the tenant may vacate the premises.—*Felst v. Peters*, 120 N. Y. Supp. 805.

54. Holding Over.—A lessee remaining in possession after the expiration of the fixed term and paying rent for the first rent term thereafter held to accept the privilege of remaining in possession for an additional term.—*Callahan Co. v. Michael*, Ind., 90 N. E. 642.

55. Libel and Slander—Justification.—A plea of justification in an action for libel, where not as broad as the libel, is bad on demurrer.—*Jacoby v. James*, 120 N. Y. Supp. 981.

56. Limitation of Actions—Compelling Reconveyance of Real Property.—A mere change in the course of studies by which a Protestant

mission was transferred by the American Board of Commissioners for Foreign Missions to the Hawaiian government held not to instantly operate to make the grantor of the property a claimant for money to be paid on breach of condition, against whom the statute of limitations immediately begins to run.—*Lowry v. Territory of Hawaii*, U. S. S. C., 30 Sup. Ct. 209.

57. Master and Servant—Assumed Risks.—When an employee knowing that his employer has furnished particular appliances for doing his work enters and continues in the service of such appliances, which are simple in their construction, and not worn out, broken, or defective.—*Lädwig v. Jefferson Ice Co.*, Wis., 124 N. W. 407.

58. Contract of Employment.—One discharged from his employment held not required to prove that he performed his part of the agreement in order to recover thereon.—*Matson v. Stewart*, Tex., 124 S. W. 736.

59. Contributory Negligence.—A railroad switchman run over and killed by an engine by reason of slipping on a pile of cinders near the track held not negligent as a matter of law.—*Preble v. Wabash R. Co.*, Ill., 90 N. E. 716.

60. Independent Contractors.—Though defendant contracted to have work done by independent contractors, she was liable for injuries caused by their negligence, if she supervised and took part in the work.—*Mehler v. Fisch*, 120 N. Y. Supp. 807.

61. Injury to Servant.—A servant, injured by having his clothing caught by a set-screw on a shaft, can recover if he did not know of the use of the screw to fasten a collar on the shaft, and was not in fault for not knowing it.—*Deschene v. Burgess Sulphite Fibre Co.*, N. H., 74 Atl. 1050.

62. Liability of Fair Association.—Where a fair association contracted with one to give balloon ascensions, defendant held liable for negligence in failing to provide plaintiff, having admission ticket, with a safe place to view the exhibition, and in failing to provide barriers against injury.—*Roper v. Ulster County Agr. Society*, 120 N. Y. Supp. 644.

63. Safe Place to Work.—Where the place in which a servant works is reasonably safe, and it is the particular work done that renders it temporarily unsafe, the rule requiring a reasonably safe place does not obtain.—*Bennett v. Crystal Carbonate Lime Co.*, Mo., 124 S. W. 608.

64. Safe Place to Work.—One employing men to put concrete foundations for piers on each side of a railroad track held not required to employ one to keep watch of approaching trains and give warning to the men.—*Di Napoli v. New York, N. H. & H. R. Co.*, 120 N. Y. Supp. 905.

65. Statutory Provisions.—The limitation in St. 1909, p. 279, c. 181, as to the hours anyone may be employed within any 24 hours in a mine, held not to include the time when a miner is going to or from his work.—*Ex parte Martin*, Cal., 106 Pac. 238.

66. Telephone Companies.—It is not the duty of a telephone company to inspect its poles below the ground and inform its linemen which are safe.—*De Frates v. Central Union Telephone Co.*, Ill., 90 N. E. 719.

67. Unsafe Appliances.—The question of a master's negligence in furnishing unsafe appliances for work must be determined with reference to the dangers to be reasonably apprehended.—*Harris v. Kansas City Southern Ry. Co.*, Mo., 124 S. W. 576.

68. Violation of Rules.—While it is usually negligence for an employee to violate a known

rule, yet, if the rule is habitually violated with the knowledge and acquiescence of the employer, then it is treated as inoperative.—*Kenny v. Marquette Cement Mfg. Co.*, Ill., 90 N. E. 724.

69.—**Wrongful Discharge.**—A salesman suing for damage for wrongful discharge held *prima facie* to prove damage by showing the amount his employer had absolutely agreed to pay him per week.—*Durante v. Raimon*, 120 N. Y. Supp. 881.

70. **Mines and Minerals—Oil and Gas Lease.**—An oil and gas lease held not a lease, as ordinarily understood, but a license to explore land for those minerals.—*Stahl v. Illinois Oil Co.*, Ind., 90 N. E. 632.

71. **Mortgages—Mortgagee in Possession.**—One taking possession under an invalid tax deed, and purchasing a subsisting mortgage, can claim the rights of mortgagee in possession.—*Jagger v. Plunkett*, Kan., 106 Pac. 280.

72.—**Mortgagee in Possession.**—A holder for value of promissory notes secured by mortgage could apply the proceeds of the sale of the mortgaged property to the payment of any one or more of the notes as he desired, and need not observe any equities between the principal debtor and an accommodation maker.—*Bradley Engineering & Mfg. Co. v. Heyburn*, Wash., 106 Pac. 170.

73.—**Stipulation for Attorney's Fees and Costs.**—A clause in a deed of trust providing for the payment by the grantor of a specified sum for solicitor's fees, etc., is intended to indemnify the grantee for disbursements reasonably and necessarily made to protect his interests or to enforce performance by the grantor.—*Huber v. Brown*, Ill., 90 N. E. 748.

74. **Municipal Corporations—Contributory Negligence.**—Where plaintiff was injured while collecting fares on the footboard of a street car, by a truck backing into the car, whether plaintiff was negligent in being in that position or was negligent in not anticipating danger from the truck were jury questions.—*Pearson v. Lyon & Healy*, Ill., 90 N. E. 693.

75. **Mines and Minerals—Forfeiture of Claim.**—Nonperformance of assessment work by a locator would not forfeit his claim unless there was a valid location by another, and one who did not himself make a valid location could not question the sufficiency of the assessment work done by the locator.—*Knutson v. Fredlund*, Wash., 106 Pac. 200.

76.—**Sidewalks.**—Abutting property owner held liable for injuries to a child falling through a hanging grating, covering an opening to the basement, while playing upon an adjacent sidewalk.—*Kelly v. Hudson Cos.*, 120 N. Y. Supp. 768.

77.—**Temporary Obstructions.**—Inconvenience, expense, or loss of business occasioned to abutting owners by the temporary obstruction of a street, and interference with their right of access, made necessary by the construction of a public improvement, gives no cause of action against the municipality.—*Chicago Flour Co. v. City of Chicago*, Ill., 90 N. E. 674.

78. **Names—Identity of Persons.**—The record of proceedings to determine the mental condition of "Jesse F. N." is not admissible to show the mental condition of "Joseph F. N." in a criminal prosecution against him.—*State v. Neubauer*, Iowa, 124 N. W. 312.

79. **Negligence—Communication of Dangerous Disease.**—A railroad company is liable for the spread of a contagious disease through the negligence of its servants, acting within the scope of their authority, whereby another is injured as the proximate result of such negligence.—*Melody v. Missouri, K. & T. Ry. Co.* of Texas, Tex., 124 S. W. 702.

80.—**Imputed Negligence.**—Plaintiff was not responsible for the acts of another who boarded a street car with him, in giving whiskey to the motorman, whereby he became intoxicated and ran the car at a dangerous speed, causing plaintiff's injuries.—*Coburn v. Moline, E. M. & W. Ry. Co.*, Ill., 90 N. E. 741.

81. **Partition—Tenants in Common.**—Tenants

in common may make a parol partition of their real estate, and, though it cannot transfer the legal title, it will be enforced in equity if followed by a several possession according to their agreement.—*Duffy v. Duffy*, Ill., 90 N. E. 697.

82. **Partnership—Dissolution.**—Neither partner, on dissolution of the firm, could avail himself of the firm's business without accounting to the other partner thereof.—*Hutchins v. Page*, Mass., 90 N. E. 565.

83.—**Expulsion of Partner.**—A partner expelled from the firm may sue to establish the firm and for an accounting after the expulsion, or he may sue at law for damages on account of the expulsion and recover prospective profits.—*Westwood v. Cole*, 120 N. Y. Supp. 884.

84.—**Holding Out as Partner.**—A doctrine that, before one can exact payment from one holding himself out as a partner, he must show that he extended credit on the faith of his acts and conduct and exercised due diligence to ascertain the true facts, held inapplicable against one to whom a representation of partnership is directly made.—*Greshner v. Scott-Mayer Commission Co.*, Ark., 124 S. W. 772.

85. **Payment—Intention of Parties.**—Where there are two separate accounts between the parties, the application of a payment which could be applied to either account is determined by the intention of the parties.—*Paragould & M. R. Co. v. Smith*, Ark., 124 S. W. 776.

86. **Pledges—Rights and Liabilities.**—A pledgee of a note and mortgage made by a third person held entitled under proper circumstances to incur expenses in preserving the collateral.—*Ely-Walker Dry Goods Co. v. Colbert*, Tex., 124 S. W. 705.

87. **Principal and Agent—Conversion.**—An action for conversion lies to recover money received by person in a fiduciary capacity which he refuses to deliver to his principal.—*Jones v. Smith*, 120 N. Y. Supp. 865.

88.—**Fraud of Agent.**—Defendant, the agent of a steamship company, held not liable for the fraudulent act of one who, having purchased a ticket with money furnished by plaintiff, thereafter surrendered the same and received the money paid.—*Lurie v. Public Bank of New York*, 120 N. Y. Supp. 855.

89.—**Notice to Agent.**—A principal is affected with knowledge of all material facts of which the agent receives notice in the course of his employment.—*Jackson County v. Schmid*, Mo., 124 S. W. 1074.

90. **Principal and Surety—Discharge.**—The termination of the principal tenancy by a landlord by the tenant's dispossess in summary proceedings because of his nonpayment of rent held to release a surety on a sublease; his obligation having been changed by such termination by virtue of Code Civ. Proc. § 2253.—*Rainier Co. v. Smith*, 120 N. Y. Supp. 993.

91.—**Release of Principal.**—While an insured, whose property was destroyed by fire set out by a railroad, might release the railroad, so as to bar his action against insurer, he could settle with the railroad and reserve his right against the insurer.—*Brown v. Vermont Mut. Fire Ins. Co.*, Vt., 74 Atl. 1061.

92. **Process—Service Outside of State.**—The service of process in another state on defendants residing there, in compliance with Rev. St. 1899, § 582 (Ann. St. 1906, p. 608), held to confer no jurisdiction over them.—*Bick v. Maupin*, Mo., 124 S. W. 588.

93. **Railroads—Carriage of Passengers.**—In an action for breach of a contract for carriage of a passenger resulting from a derailment, the carrier's liability is subject to the same rules and may be established by like testimony and presumptions as in cases of torts.—*El Paso & N. E. Ry. Co. v. Landon*, Tex., 124 S. W. 744.

94.—**Direction of Verdict.**—In an action against a carrier for breach of contract of transportation in refusing to receive as a passenger one who bought a ticket, as the carrier was liable for the passage money at least, a directed verdict for defendant was improper.—*Connors v. Cunard S. S. Co.*, Mass., 90 N. E. 601.

95.—**Frightening Animals.**—A railroad company is not liable for injuries resulting from

plaintiff's team running away on taking fright at the ordinary noise by the sudden escape of steam from a locomotive.—*Ford v. Houston & T. C. R. Co.*, Tex., 120 S. W. 715.

96.—**Frightening Horses.**—Trainmen not knowing of the presence of a horse near the track do not make the railroad liable for frightening the horse by noises unless they are unusual and unnecessary.—*Christie v. Louisville & N. R. Co.*, Ky., 124 S. W. 796.

97. **Records—Registration of Title.**—Where a petitioner for the registration of title moved to dismiss his petition without prejudice, under Rev. Laws, c. 128, § 36, such motion should have been passed on and disposed of before any other action was taken respecting the petition.—*Foss v. Atkins*, Mass., 90 N. E. 578.

98.—**Report of Auditor.**—Where the report of an auditor to whom a cause was referred showed such circumstances as might support a conclusion different from that reached by the auditor, the court improperly directed a verdict in accordance with such conclusions.—*Fisher v. Doe*, Mass., 90 N. E. 592.

99. **Release—Restoration of Consideration.**—Where the fraud in securing the release of plaintiff's claim was in getting him to execute the same in ignorance of its contents, and not in obtaining his assent to the settlement, he is not required to return the consideration received before contesting its validity.—*Herman v. P. H. Fitzgibbons Boiler Co.*, 120 N. Y. Supp. 1074.

100. **Remainders—Accrual of Right.**—Limitations held not to have begun to run against the right of remainderman to claim land as against a railroad company until after the death of the life tenant whose interest the railroad company had acquired.—*Bartlow v. Chicago, B. & Q. R. Co.*, Ill., 90 N. E. 721.

101. **Replevin—Petition.**—Where, in replevin, the affidavit stated the value of the property, and that it had not been seized under any process, execution, or attachment, it was sufficient, though the petition did not state such facts.—*Marshall v. Moore*, Mo., 124 S. W. 585.

102. **Sales—Construction of Contract.**—In replevin for machinery sold under written orders of purchase, a catalogue describing the machinery was properly admitted in evidence as part of the sale contract.—*Robinson & Co. v. Ligon*, Mo., 124 S. W. 590.

103. **Specific Performance—Partial Performance.**—Where the wife of the vendor refuses to execute a deed in specific performance of a contract made by her husband alone, the vendee may elect to take the premises subject to her dower right, with a deduction from the purchase price of a sum equal to the gross value of such right.—*Maas v. Morgenthaler*, 120 N. Y. Supp. 1004.

104.—**Unfair Contracts.**—Specific performance of an oral contract for the sale of real property, partly performed, where the contract is unreasonable, held properly refused to the vendee.—*Haffner v. Dobrinski*, U. S. S. C., 39 Sup. Ct. 172.

105. **Street Railroads—Injury to Alighting Passenger.**—Where it was customary for passengers to board and alight from a street car at a certain point, it was the duty of the street car employees to use ordinary care to protect passengers getting off there.—*Central Kentucky Traction Co. v. Chapman*, Ky., 124 S. W. 830.

106. **Taxation—Burdening Federal Taxation.**—The requirement that receipts for payment of federal internal revenue tax for selling liquors be published at the holder's expense, made by Act N. D. March 13, 1907 (Laws 1907, c. 189), held invalid as placing the burden on the taxing power of the federal government.—*State of North Dakota v. Hanson*, U. S. S. C., 30 Sup. Ct. 179.

107.—**Charitable Institutions.**—A Masonic Lodge held a "charitable institution" within Code, § 1467, so that a devise to it was exempt from inheritance tax.—*Morrow v. Smith*, Iowa, 124 N. W. 316.

108.—**Situs of Property.**—Grain removed from cars between points of shipment and des-

tination, under permit in shipping contract, to owner's private elevator for inspection, etc., held not in transit, but to have a *situs* there for purpose of taxation.—*People v. Bacon*, Ill., 90 N. E. 686.

109. **Trial—View by Jury.**—A view by the jury should not be directed unless the peculiar character of the case or the circumstances brought out in evidence make it manifest that without a view the jury cannot reach a proper conclusion.—*Illinois Cent. R. Co. v. Frost*, Ky., 124 S. W. 821.

110. **Trusts—Capital and Income.**—The increase in the value of a fund held in trust to pay the income to one for life, and on his death to transfer the same to others, is a part of the capital and the remaindermen are entitled thereto.—*Carpenter v. Perkins*, Conn., 74 Atl. 1062.

111.—**Fiduciary Relations Between Parent and Child.**—A son does not as a matter of law stand in a fiduciary relation to his father as to transactions between them.—*Dick v. Albers*, Ill., 90 N. E. 683.

112. **Telegraphs and Telephones—Damage to Property Abutting Street.**—A foreign telephone company is not exempt from payment of damages to abutting property by construction of its lines in a street under a permit from the state and a city.—*Southwestern Telegraph & Telephone Co. v. Smithdeal*, Tex., 124 S. W. 627.

113.—**Delivery to Wrong Address.**—Where a telegraph company delivered a message at the Oriental Hotel, instead of in care of the Oriental Oil Company, to which it was addressed, the company was negligent.—*Postal Telegraph Cable Co. of Texas v. Smith*, Tex., 14 S. W. 733.

114.—**Failure to Transmit Message.**—In an action against a telegraph company to recover a penalty for a failure to transmit a message, certain evidence held to support a finding that the message was delivered and the price of transmission paid to defendant's agent.—*Western Union Telegraph Co. v. Gilkinson*, Ind., 90 N. E. 650.

115.—**Foreign Corporations.**—The exaction from a foreign telegraph company for the benefit of the permanent school fund, under Gen. St. Kan. 1901, p. 280, § 1261, of a charter fee as a condition of doing local business in the state, is invalid under the due process of law clause of the federal constitution.—*Western Union Telegraph Co. v. State of Kansas*, U. S. S. C., 30 Sup. Ct. 190.

116. **United States—Liability on Bond of Public Contractor.**—The additional phrase "the person or persons supplying the contractor with labor and materials," used in Act Feb. 24, 1905, c. 778, in describing the persons entitled to copy of the contract and bond for purposes of suit, held not to change the rule that labor and materials used in a public work, though furnished to a subcontractor, are within the obligation of the bond.—*Mankin v. United States*, U. S. S. C., 30 Sup. Ct. 174.

117. **Usury—Bonus of Agent.**—That the lender's agent exacted a bonus from the borrower does not render the transaction usurious, where the lender received no part of the bonus and had no knowledge of such exaction.—*Silverman v. Katz*, 120 N. Y. Supp. 790.

118. **Vendor and Purchaser—Bona Fide Purchaser.**—To entitle a subsequent purchaser to have a prior unregistered conveyance postponed, it must appear that he was a bona fide purchaser without notice.—*Davidson v. Ryle*, Tex., 124 S. W. 616.

119. **Waters and Water Courses—Public Supply.**—Where a city supplies water which is not absolutely pure, no action can be brought against it by a citizen to compel it to furnish pure water; he having no grievance other than that borne by the rest of the community.—*Oakes Mfg. Co. v. City of New York*, 120 N. Y. Supp. 796.

120. **Weapons—Burden of Proof.**—In a prosecution for carrying a pistol, the burden is not upon accused to prove his defense beyond a reasonable doubt.—*Humphries v. State*, Tex., 14 S. W. 635.

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STATUTE FORBIDDING TAKING ORDERS FOR INTOXICATING LIQUORS.

A problem for prohibition states is to get as much benefit from the Wilson act in furtherance of their policy as can be obtained.

The case of Heyman v. Southern Ry. Co., 203 U. S. 270, settled definitely the meaning of "arrival" under that clause of the act which provided that all intoxicating liquors "transported into any state or territory, or remaining therein for consumption, sale or storage therein, shall upon arrival in such state or territory, be subject to the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." It was there held that "arrival" did not mean either coming into the state, or reaching the point of destination therein, while still in the possession of the carrier, but it meant delivery to the consignee. Until such delivery liquor retained its character as an article of interstate commerce and was entitled to the same protection as other such articles, the effect of the Wilson act being, upon delivery, to strip it of that character.

The Georgia supreme court had ruled that the Wilson act merely protected liquor during transportation and state law attached *co instanti* the carrier's liability changed to that of warehouseman. This ruling was reversed. Therefore no seizure could be legal until the liquor passed from the custody of the carrier.

Mr. Justice White explained, however, that the court was not deciding, that seizure could not be avoided if a liquor shipment

were left with a carrier for an unreasonable time after it had reached its point of destination, as then it might be deemed to have been "constructively delivered." But it was settled, that prohibition laws could not get any aid from the Wilson act, if a consignee were willing to take all risk subsequent to carriage and delivery.

But another class of statutes is found in the laws of Kansas and South Dakota aimed directly at the entering into contracts within those states for the future purchase and sale of liquor to be shipped from other states.

The case of Delamater v. South Dakota, 205 U. S. 93, upholds the constitutionality of the South Dakota law, and the case of Crigler v. Shipley, 79 Kan. 834, holds that the Kansas statute is "within the principles of the Delamater decision, not obnoxious to the federal constitution." A later decision by the Kansas supreme court is more squarely in point as being governed by the Delamater decision than the Crigler case, as by that the statute was enforced in a criminal case against its offender. State v. Sherman, 107 Pac. 33.

The Crigler case and another civil suit, decided by the South Dakota supreme court subsequently to the decision of the Delamater case, we will consider when we have made further reference to the Delamater case. See Jones v. Yokum, 123 N. W. 272.

Justice White said in the course of his opinion in the Delamater case, that: "The business of soliciting proposals in South Dakota was one which that state had a right to regulate, wholly irrespective of when or where the proposals would be accepted or whence the liquor which they embraced was to be shipped."

We ascertain, then, that the state law forbidding the soliciting of orders in the state is the specific penal offense and not the acceptance of those orders outside, or shipment of liquor from the outside in pursuance thereto.

The case of Crigler v. Shipley was a suit by a traveling agent of a liquor house for

his commission on sales made upon orders solicited in Kansas and the court held him not entitled to recover, upon the familiar principle that plaintiff was suing for services rendered in criminal transactions. But did this principle apply? Merely soliciting orders for liquor was not what entitled to commissions, but commissions, if he was entitled to any, accrued upon sales made to those whose orders had been illegally solicited. The sales were legal, but the means of bringing about this lawful result were illegal. Therefore the services being illegally rendered, no recovery therefor can be claimed, a conclusion by the court seemingly sound.

But can the same thing be said of the conclusion of the South Dakota supreme court in the Yokum case? In that case it was allowed to be shown that the consideration of a note sued upon was liquor shipped f. o. b., Lexington, Ky., order for which was obtained by a traveling agent of plaintiff soliciting orders for liquor in contravention of the South Dakota statute. The ruling of the court was that the sale was illegal, because the non-resident plaintiff had not complied with the laws of South Dakota regulating the sale of intoxicating liquors at wholesale, saying "substantially all of the questions involved in this case are determined in" the Delamater case.

No stress is laid upon the fact that the note was procured upon an unlawful soliciting by the agent, but recovery is denied on the theory that the sale was made in South Dakota and no license had been taken out by plaintiff as a wholesaler.

But is it not evident, whatever the precedent matters to the shipment, that the liquor was sold in Kentucky, and not in South Dakota and as there made it was a valid sale? If a valid sale there, there would seem to be some question as to South Dakota courts lending their comity jurisdiction to enforcing the contract of sale, because the consideration of its making was something contrary to its public policy. But that there was a valid consideration, independent of

comity, seems to us beyond any reasonable doubt.

It seems to us, also, that as the case was decided, there is a federal question presented, to-wit: That the South Dakota court has denied to a contract, valid under the interstate commerce clause, its legal enforcement. But whether the state courts could refuse to enforce it as being contrary to its public policy would present a federal question is much more doubtful. And even if the federal supreme court should hold, that enforcement should not be denied because of public policy, and that this denial presented a federal question, we do not see how its view might be made to prevail, if South Dakota were unwilling.

NOTES OF IMPORTANT DECISIONS.

CARRIERS—FAILURE TO DELIVER EXCUSED BY SEIZURE UNDER PROCESS IS SUING UNDER VOID STATUTE.—The Supreme Court of Georgia follows what appears to be a well settled rule of the federal supreme court, that seizure under process of goods in its possession by officers of the law does not render a carrier liable as for loss, though the process be based upon an unconstitutional statute. *Southern Exp. Co. v. Gottlie Bros.*, 67 S. E. 414.

The rule has been thus stated by the late Justice Brewer: "The duty of the carrier to safely carry and promptly deliver to the consignee the goods intrusted to it does not require it to forcibly resist judicial proceedings in the courts of the state into or through which the goods are carried. While the carrier may appear and contest the validity of a seizure under judicial process of goods in its custody, if it reasonably notify the owner and call upon him to defend, it is relieved from further responsibility; and in the absence of fraud or connivance on its part, it may plead the judgment rendered against it as a bar in an action brought by the owner." *American Exp. Co. v. Mullins*, 212 U. S. 311.

The Mullins case, just as did the Georgia case, concerned a liquor shipment into a prohibition state, and it would certainly seem, that such an interposition of force as a writ

in the hands of officers of the law ought to be deemed vis major excusing a common carrier.

It also would seem better that shippers, who thus seek to invade state policy, should stand the brunt and risk of loss rather than be allowed to shift such attacks upon those who, if they refused to accept articles offered for shipment, might incur liability at the point of shipment.

Many cases of a like tenor are cited in the opinion in the Georgia case.

NATIONAL BANKS—ERECTING BUILDINGS TO CONTAIN OFFICES FOR TENANTS.—The national banking act permits a national bank to hold only such real estate as shall be necessary for its immediate accommodation in the transaction of its business. It was claimed in a case lately decided by Fourth Circuit Court of Appeals that this limitation prevented a national bank from tearing down an old structure located on very valuable ground in a city and erecting thereon a building better adapted for the transaction of its business and for the purpose of enabling it to utilize advantageously its valuable location, and, thereby to lessen the expense of its own occupation, construct upper stories with offices to be let to tenants. *Wingert v. First Nat. Bank*, 175 Fed. 739.

A per curiam opinion adopted the opinion rendered by Morris, district judge, who followed the ruling in *Brown v. Schleier*, 118 Fed. 981, 55 C. C. A. 475, that: "If the land which a national bank purchases or leases for the accommodation of its business is very valuable, it may exercise the same rights that belong to other land-owners of improving it in a way that will yield the largest income, lessen its own rent and render that part of its funds which are invested in realty most productive."

The narrow rule that was contended for loses sight of the spirit of the prohibition. This prohibition was not meant to interfere in any way with a bank's establishing its business in whatsoever quarters its management should deem to its advantage in the conduct of its business. The opinion of Judge Morris in the *Wingert* case shows that the practice of national banks has been to pursue just the course that was objected to and departmental approval has been expressly given thereto.

We may well conceive that bank occupancy for its reasonable needs might constitute such an inconsiderable portion of floor space as to make its claim about investment in ground and building as legitimate employment of its funds untenable, but at least there ought to be reasonable latitude or discretion allowed as to this.

"THEORY OF THE CASE"—WRECKER OF LAW.

II.

In the preceding article, the position is advanced that the "theory of the case" doctrine is injuring the structure of the law. One difficulty in the way of an understanding of the baleful influence of this doctrine, is that we lawyers are trained to regard what is termed "adjective law" as of less importance than "substantive" law. We are taught that there is some material distinction between adjective and substantive law. Such an attempted distinction, it can be shown, is illusive. "Substantive" law does not exist except as the result of "adjective" law given to enforce it. Change the adjective law and you change the substantive, necessarily. Repeal the "adjective" law and the substantive is gone.

Ubi jus ibi remedium.

A study of equity and its fundamental principles will show that rights and remedies are reciprocals, are interactions. It would lead away from the orient peaks of equity, and introduce confusion to attempt to reason from an arbitrary and crochety classification of substantive law here and adjective law there.

The case of *Reigart v. Coal Co.*, 217 Mo. 142, is a very good example of how "adjective law" interweaves with "substantive," and how changes in the former create, modify or destroy the latter. The coal company had contracted in writing with Reigart to sell him such coal at certain rates as he should order during a specified time, at \$1.75 per ton. But Reigart did not agree to order any coal, so, of course, there was no consideration expressed in the contract. Reigart sued for a breach of this contract, and endeavored to show, by oral evidence, that, as a matter of fact, there was a consideration.

Now, prior to this case, it was the holding of the Missouri Supreme Court that, notwithstanding the statute of frauds requires such contracts as Reigart's to be in writing, nevertheless, the consideration might be shown by evidence aliunde the writing itself. So that, under this interpretation by the court of an "adjective" rule of law, Reigart had a perfect "substantive" right, supported by a formidable array of cases. *Bean v. Valle*, 2 Mo. 126; *Halsa v. Halsa*, 8 Mo. 303; *Ivory v. Murphy*, 36 Mo. 534; *O'Neill v. Crain*, 67 Mo. 250; *Ellis v. Bray*, 79 Mo. 227.

By these decisions, *Wain v. Warlters*, Smith's Lead. Cas., l. c. 335, 3 Hughes Gr. & Rud., was denied.

But the *Reigart* case overruled all these earlier Missouri cases—put the law back upon the English basis—*Wain v. Warlters*—by holding that the contract must itself show the consid-

eration, and Reigart's "substantive" right disappears.

Many illustrations might be given were there space. Take, for instance, situations like that developed in *Texas & Pacific R. R. v. Humble*, 181 U. S. 57, 45 L. Ed. 747, 4 Hughes' Gr. & R. 1047, where a married woman's "substantive" right to a recovery for a personal injury incurred in Arkansas, depends upon whether she is suing in Arkansas, where the husband need not be joined, or is suing across the border in Louisiana, where she has no "substantive" right unless she can reach it through an "adjective" law requiring her to join her husband.

Professor Henry S. Redfield, of Columbia College, takes the view that "the rock upon which the whole fabric of the law is in danger of going to pieces, is the lack of real knowledge on the part of practitioners of procedure." 25 Am. Bar. Ass'n Rep. 549; see, also, the address of Franklin W. Danaher, 34 Am. Bar Ass'n., (1910), 787.

In view of this intimate relation, this necessary interlacing of "adjective" and "substantive" law, is it not marvelous that so little attention is paid to procedure and practice in our prominent law schools? By procedure and practice is not meant the varying details of local or state codes and practice acts. Far from it. What is meant is that the student should be grounded in the great maxims of procedure like, "frustra probatur quod probatum non relevat." It is vain to prove what is not alleged, mentioned in the preceding paper. 70 Cent. L. J. 294. If maxims like this were understood, our reports would not be as they now are a series of unsolvable contradictions, one case recognizing under the "theory of the ease rule," as "substantive" rights, everything that crops out in the evidence, whether embraced in the pleadings or not, and the next case refusing to recognize any right not set out in the pleadings.

A case illustrating what is conceived to be the true rule, under the maxim referred to, that the proof is limited by the pleadings, is *Crockett v. Lee*, 7 Wheat. (U. S.) 522, in which Chief Justice Marshall lays down the rule in these words:

(p. 526.) "The counsel for the appellant says it would be monstrous if, after the parties have gone to trial on the validity of the entry, and have directed all their (p. 527) testimony in the circuit court to that point, their rights should be made to depend in the appellate court on a mere defect in the pleadings, which had entirely escaped their observation in the court where it might have been amended, and the non-existence of which would not have varied the case."

"The hardships of a particular case would not justify this tribunal in frustrating the fundamental rules of a court of chancery; rules which have been established for ages, on the soundest and clearest principles of general utility. If the pleadings in the cause were to give no notice to the parties or to the court of the material facts on which the right asserted was to depend, no notice of the points to which the testimony was to be directed and to which it was to be limited; if a new case might be made out in proof differing from that stated in the pleadings, all will perceive the confusion and uncertainty which would attend legal proceedings, and the injustice which must frequently take place. The rule that the decree must conform to the allegations, as well as to the proofs of the parties, is not only one which justice requires, but one which necessity imposes on courts. We cannot dispense with this in this case."

Judge Marshall saw the state's interest in litigation, and he safeguarded it by applying the maxim, *frustra probatur*, etc., although he does not name it expressly. A maxim is nothing but one way of expressing a principle. Its essence is reason. Here the reason is that the state must have a permanent record of what was decided, for the use of the whole public, on questions of *res adjudicata* and collateral attack. Says Marshall: "Not only does justice require it, but necessity imposes it on courts." No need to quote "our statute." The court's inherent power is sufficient. Nowadays we make idols of "our statutes," and worship them as blindly as an Esquimo worships his totem pole.

Let us turn from Chief Justice Marshall to Judge Seymour D. Thompson, and see whether he perceives the interests of the state in procedure. We quote from his work on Trials:

"Section 2310. View That the Jury Should be Instructed Upon the Case Made by the Evidence, Although Variant from the Issues Made by the Pleadings.—This view ignores a principle which obtains in almost every situation in a civil trial, that the court is to disregard at every stage of the trial those errors or irregularities which it is competent for the party to waive, and which the party against whom they are committed does not object to at the time. The object of pleadings being merely to notify the opposite party of the ground of action or defense, if the party comes into court, it is not perceived why he may not waive the notice as in every other case, although the pleading may not advise him of the case or defense which is actually tendered in the evidence. Several of the best courts in the country proceed upon this enlightened view. The sound view is believed to be that the instructions have no connection with the plead-

ings, except through the evidence. The jury 'find from the evidence,' and not from the pleadings. The pleadings are intended to apprise the opposite party of the ground of action or defense, and to guide the court in admitting or rejecting evidence. The jury have nothing to do with them; are not permitted to take them to their room when they retire; and it is unprofessional for counsel to comment on them to the jury, nor should the judge permit it to be done. Suppose, then, that facts come out in the evidence broader than those alleged in the pleadings, or otherwise varying from them. Is the judge to instruct the jury upon the whole evidence, or is he to limit his instructions to so much of the evidence as is within the scope of the pleadings? The proper answer is believed to be this: If neither of the parties has objected to the evidence on the ground of variance, the judge is to instruct the jury upon the whole evidence; the rule being, that a variance between the pleadings and the evidence is no ground of error, unless the evidence was objected to on this ground at the time it was offered," etc., etc. See 4 Gr. & Rud. Title Variance.

Judge Thompson seems to have been the father of the "Theory of the Case." What Mansfield, Marshall, Kent, Story, Elginborough and Shaw say cannot be done without wrecking the law, he advocates it apparently without a thought of consequences, merely in order to accommodate the parties by letting them thresh out everything that occurs to them at the trial. If this is not a reversion to patriarchal ways, what is it? It was not the Roman practice, and certainly it is neither English nor federal. It is "theory of the case," and that is all. See Theory of the Case, 4 Gr. & Rud.

Here are two examples of the Missouri situation, side by side:

"Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a grave case. To constitute this there are three essentials:

First. The court must have cognizance of the class of cases to which the one adjudged belongs. Second. The proper parties must be present, and, third, the point decided must be in substance and effect, within the issue."

"But while this is unquestionably the law of this state, plaintiff invokes the rule of pleading that this defense of equitable estoppel is not open to defendant, for the reason that it is not pleaded. That an estoppel in pais should be pleaded in order to be available, is true. (Bray v. Marshall, 75 Mo. 327; Noble v. Blount, 77 Mo. 235.) But in Price v. Hallett, 138 Mo. l. c. 574,

J. Law, 422; l. c. 79, 3 Gr. & Rud.

"A court may be said to have jurisdiction of the subject matter of a suit when it has the right to proceed to determine the controversy or question in issue between the parties, or grant the relief prayed. What the controversy or issue, in any case, is, can only be determined from the pleadings. When the court has cognizance of the controversy, as it appears from the pleadings, and has the parties before it, then the judgment or order, which is authorized by the pleadings, however erroneous, irregular or informal it may be, is valid until set aside or reversed upon appeal or writ of error. This doctrine is founded upon reason and the 'soundest principles of public policy.' It is one,' says the court of Virginia, 'which has been adopted in the interest of the peace of society, and the permanent security of title.' Hope v. Blair (1891), 105 Mo. 85-97, 24 Am. St. 366-374n.

this court said: 'It seems to us this doctrine has peculiar weight when invoked against the admissibility of evidence when no issue of estoppel has been tendered in the pleadings or when an estoppel in pais is urged for the first time in this court, but where parties have permitted an issue of the kind to be raised by the evidence without objection, and have had full opportunity to try the issue we are unable to draw a distinction between such a case and those cases in this state in which parties have neglected to file replies, and this court has held that it was too late after trying the case as if a reply had been filed to claim that the answer was admitted.'

"An examination of the record will disclose that much of the testimony in regard to this license came from the plaintiff in the first instance and that no such objection as this was urged when the telegrams between Mr. Yoakum and Mr. L. B. Houck were offered in evidence; indeed, we find no objection of any kind in the abstract before us. With these telegrams in evidence and the proof that by the permission therein granted defendant entered and constructed its tracks (p. 487), we think the facts were before the court, whether formally pleaded or not, and it is too late now to raise the question of pleading for the first time."

The above quotations are given not as examples of a condition peculiar to Missouri; on the contrary, they represent the condition of the law in a majority of the states.

We take Illinois as another example. Fish v. Cleland, 33 Ill. 237-245 1. c. 12c, 3 Gr. & Rud., dismisses as unworthy of consideration probata that had no foundation in the allegation.

So, in Kenealy v. Glos, 241 Ill. 22-24, the court says: "There was therefore no issue of fact before the court to which the evidence was pertinent. This evidence being incompetent, it must be assumed that the court disregarded it." See, also, Thomas v. P., 170 Ill. 517-528, 47 Am. Rep. 458; Fletcher v. Root, 240 Ill. 429; Israel v. Reynolds, 11 Ill. 218. (See Lead. Cas. 83, 3 Gr. & Rud., where conflicting cases of Illinois are cited.)

Then turn to Devine v. Ry., 237 Ill. 278-284: cases, where it is held that going to trial without issues raised by the pleadings waives the issues. In other words, there has come a new dispensation, and now it is not necessary to have pleadings. They are old-fashioned, obsolete. See, also, Kelsey v. Lamb, 21 Ill. 559: cases; also, Balsewicz v. R. R., 240 Ill. 238, reviewed 70 Cent. Law Jour. 5, where in an action for personal injuries, although the defendant railroad had not pleaded a release, it was allowed to set it up at the trial, to the utter discomfiture of the plaintiff, father of the killed boy, because the release was signed by a fictitious administrator of the deceased youth, who had taken out papers in a court of probate that had neither territorial jurisdiction, nor was its order granting the letters of administration founded on fact. Other similar cases will be found under the title "Illinois," 2 Gr. & Rud.

From the foregoing cases of two great states, we have sought to indicate a conflict of opinion that is inimical to the due administration of law. From this it appears why it is that if one leaves his state, he leaves his profession behind, while at home it is a tangle of statutes and decisions through a thousand books constituting the "jungle" now referred to in the lay press.

If the condition in New York is "appalling" (34 Am. Bar Ass'n Rep. 787; see, also, the Corpus Juris Green Bag, 1910), what shall we call the condition in these states?

It is submitted whether these conclusions are not well founded:

Adjective law has a tremendous influence upon substantive law.

That ignorance of the maxims underlying adjective law, that is, procedure, leads to a most lamentable result in the destruction of our substantive law.

That the cure lies largely in a knowledge of the principles of procedure, which are made up of maxims that has always been, and must continue to be, the law.

Now, can it be said that the case is a more reliable guide than is the maxim? *

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* If the condition in New York is "appalling" (34 Am. Bar Ass'n Rep. 787; see, also, the Corpus Juris Green Bag, 1910), what shall we call the condition in these states?

WITHOUT TENDER OF THE VALID PORTION, NO INJUNCTION WILL BE GRANTED RESTRAINING THE COLLECTION OF ILLEGAL TAXES.

There is a long line of decisions in the federal courts, and in many of the state courts, holding that equity will not enjoin the collection of taxes, claimed to be illegal, until the plaintiff has first paid or tendered the amount of taxes assessed against him, the legality of which he does not question.¹ This rule is based upon the maxim that "He who seeks equity must do equity," is a just and salutary rule and should be strictly enforced. The federal courts have thus enforced the rule, and in German National Bank v. Kimball,² the court makes clear its position in the following language: "We have announced more than once that it is the established rule of this court that no one can be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying so much of the tax assessment against him as it can be plainly seen he ought to pay. That he should not be permitted, because his tax is in excess of what is just and lawful, to screen himself from paying any tax at all until

(1) German National Bank v. Kimball, 103 U. S. 732; State Railroad Tax Cases, 92 U. S. 575, 616; Northern Pacific R. Co. v. Clark, 153 U. S. 252; Albuquerque Board v. Perez, 147 U. S. 87; Odmin v. Woodruff, 23 L. R. A. 699; Bundy v. Summerland, 142 Ind. 92, 98; Board v. Dally, 115 Ind. 360, 362; Hewett v. Fenstamaker, 128 Ind. 315; Grand Rapids Ry. Co. v. City of Grand Rapids, 137 Mich. 587.

(2) 103 U. S. 732.

the precise amount which he ought to pay is ascertained by a court of equity. That the owner of property liable to taxation is bound to contribute his lawful share to the current expenses of government and can not throw that share on others while he engages in an expensive and protracted litigation to ascertain that the amount which he is assessed is or is not a few dollars more than it ought to be. But that before he asks this exact and scrupulous justice he must first do equity by paying so much as it is clear he ought to pay, and contest and delay only the remainder."

The bill in German National Bank v. Kimball sought to evade this rule by alleging that by reason of the absence of all uniformity in values, it was impossible for any person to compute or ascertain what the stockholders ought to pay on their shares of stock, but this evasion was not countenanced by the court, and the bill was dismissed for the failure to pay or tender the taxes due on the conceded value of the shares of stock. However, where the taxing officers have failed to keep such a record that the tax-payer could acquire the necessary information from which to determine the amount of the tender, the payment or tender of the taxes conceded to be due has been excused.³ But even in this event the more equitable procedure would have been for the plaintiff to offer security sufficient to cover the amount likely to be found due. In Fargo v. Hart⁴ such security was offered by the plaintiff.

If part payment of the taxes is not accepted, then a legal tender must be made of the amount of taxes conceded to be due. The tender must not be made on any condition prejudicial to the party to whom it is made, for, if not accepted, it is no tender. In Lynch v. Jennings,⁵ the court, in speaking of conditional tenders, said: "When a strict and unconditional tender has been made and followed by an actual payment into court, the adverse party can take the

money without impairing his right to prosecute his action. But when money is tendered upon a condition, the party to whom the tender is made is not entitled to the money until there has been a performance of the condition and where money is conditionally paid into court, the acceptance of the same is an admission that the party so paying is entitled to the relief prayed for."

Accordingly, a tender of an amount less than the entire tax, upon condition that the tender be accepted in full payment of the disputed tax, would not be a valid tender. It would place the tax collector in a position where he must either reject the tender entirely, or accept it as a full and complete discharge of all the taxes then payable. Whether such a sum is the correct amount, or less than the amount actually due, is a question for a court to decide, and the question can not be put to the tax collector for decision at his peril. Such a condition annexed to the tender is prejudicial to the party to whom made and renders the tender a nullity. The decisions are in accord that a tender of a part of the taxes, upon condition that the money be accepted in full for the entire tax, is not a valid tender.⁶

In State Railroad Tax Cases,⁷ the United States Supreme Court thus held: "It is a profitable thing for corporations or individuals whose taxes are very large to obtain a preliminary injunction as to all their taxes, contest the case through several years' litigation, and when in the end it is found but a small part of the tax shall be permanently enjoined, submit to pay the balance. This is not equity. It is direct violation of the first principles of equity jurisdiction. It is not sufficient to say in the bill that they are ready and willing to pay whatever may be found due. They must pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be

(3) Houghson v. Crane, 115 Cal. 304; First National Bank v. Covington, 103 Fed. 523.

(4) 193 U. S. 490, 502.

(5) 42 Ind. 276, 288.

(6) State Railroad Tax Cases, 92 U. S. 575, 616; Albuquerque Nat'l. Bank v. Perea, 147 U. S. 87, 90; City of Jeffersonville v. Louisville & Jeffersonville Bridge Co., 169 Ind. 641, 656.

(7) Supra.

thus tied up as to that of which there is no contest, by lumping it with that which is really contested. If the tax officer refuses to receive a part of the tax it must be tendered, *and tendered without the condition annexed of a receipt in full for all the taxes assessed.* We are satisfied that the observance of this principle would prevent the larger part of the suits for restraining collection of taxes which now come into the courts. We lay it down with unanimity as a rule to govern the courts of the United States in their action in such cases."

In the case of the City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.,⁸ recently decided in the Indiana Supreme Court, the plaintiff had tendered the portion of taxes conceded to be due as full payment of the entire tax assessed against it. The court, in passing on the sufficiency of this tender, held that it was the duty of the plaintiff "to make a tender of the amount of taxes which the complaint concedes to be equitably due, and this tender should have been unconditional, to the end that the treasurer might receive it without being placed in the attitude, when making his defense, of having assumed an inconsistent position. Public interest, as well as equitable considerations, require the tender of that portion of the taxes which, on the theory on which the bill proceeds, confessedly ought to be paid." A temporary injunction was refused the Bridge Company by reason of its failure to make a legal tender of the taxes confessedly due.

While it is clearly the law that a taxpayer who seeks an injunction against the collection of a tax which is illegal only in part, must pay or tender the part which he concedes to be legal, this rule is not applicable when the entire tax is void, and in such event no tender is necessary.⁹ As the term "void" has long been a much abused and wrongly-used term, it is interesting to note the limitations thrown around the word in this connection. The federal courts have given it a narrow construction. In

People's National Bank v. Marye,¹⁰ the United States Supreme Court at great length defined the limitations of the term "void," and said: "We are of opinion, however, that these assessments were not void within the meaning of the rule which absolves the taxpayer from the necessity of paying or tendering the amount equitably due from him. If there were no right to assess the particular thing at all, either because it is exempt from taxation, or because there is no law providing for the same, an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction, because there could be no amount equitably due where there never had been a right to assess at all. Where, however, there is a statute which provides for an assessment and gives jurisdiction to the taxing officer, under some circumstances, to make one, but the particular assessment is invalid for want of notice to the taxpayer, or some other kindred objection, the equitable duty still rests upon him to pay what would be his fair proportion of the tax as compared with that laid upon other property before he can ask the aid of the chancellor to enjoin the collection of the balance. This is the equitable rule, and it is good morals as well. To say that the act under which the tax is levied is unconstitutional, and therefore is the same as no law, and hence there is no duty to pay anything, because no tax can be levied without some law therefor, is to state the proposition too broadly. We concede that if the law were unconstitutional because, for instance, there is no constitutional power to tax the particular property, there is no necessity to pay anything. But where some part of the law may be unconstitutional because of a failure to comply with some matter of detail, but the amount which the owner of the property ought to pay is perfectly clear under the provisions of law, then if the taxpayer desire to be exempted from paying more than his share, he must pay or offer to pay his proportion before equity will aid

(8) Supra.

(9) *Fargo v. Hart*, 193 U. S. 490, 502; *People's Nat'l. Bank v. Marye*, 191 U. S. 272, 281.

(10) 191 U. S. 272, 281.

him in his effort to escape paying a disproportionate share. The statute herein provides for a tax and creates the equitable obligation to pay some amount by reason of the same, and even though there may be some obstacle which prevents its entire legality, yet the person assessed should recognize his equitable obligation to pay the tax to the extent stated before he can base any claim for assistance of equity to get rid of the balance of the tax. * * * So, when he comes into a court of equity to ask its aid, should it appear, on his own statement or otherwise, that if all the claims he makes were allowed, he would still equitably owe the government a certain sum by reason of the statute providing for the assessment and his ownership of the property assessed, will he be heard to insist that the court grant him an injunction preventing the collection of any tax, because he had no notice of the assessment? He owes something to the government as a tax upon his shares, and ought any court of equity to aid him in escaping all obligation because, while insisting that the whole assessment is illegal, it yet clearly appears that a portion thereof, even if uncollectible, is nevertheless equitably and justly due? *Is the equitable obligation arising by reason of these statutes, and under these circumstances, to pay some tax, completely obliterated because the particular tax cannot be legally collected, and may be called void? We think clearly not.* This same reason applies not only to a lack of notice, but also to the case of a claim that the tax is illegal because it did not allow deductions which by the federal statute should have been allowed. The tax under such circumstances is not void, but at most, voidable for the illegal amount."

So much confusion has arisen in all branches of law in distinguishing between "void" and "voidable," that it is not surprising that in this connection the term "void" should in some instances be given too broad a meaning. There are a few decisions and dictums which apparently do not recognize the narrow rule laid down in People's National Bank v. Marye, but with few excep-

tions, a careful scrutiny of the facts will reveal that the tax was more than "irregular" or "illegal;" that the tax was in fact void, for the reason that the property was either exempt from taxation, or because there was no law making the particular property liable to taxation. Yocom v. First National Bank,¹¹ is apparently an exception to the rule announced in People's National Bank v. Marye. In this case the capital stock of the plaintiff had been assessed, and afterward an increase of \$16,000.00 was added to the assessment at a time when it was contended the taxing board was not legally in session. It was not claimed that the stock was exempt from taxation or that the assessment would have been illegal if made at a time when the board could lawfully act on the assessment. An action was brought to enjoin the entering of the \$16,000.00 increase on the tax duplicate, but no tender was made of any part of the taxes. The court held: "If the complaint were to enjoin the collection of taxes, part of which were legal and part illegal, the complainant would be required to pay or tender payment of the legal portion, and this averment would be necessary before injunctive relief would be granted; but that is not this case, nor is this case within the principle or rule which requires such averment to be made. This action is to set aside a particular order alleged to be void, whereby a specific sum, to-wit: \$16,000.00 it is averred was illegally added to the assessed value of appellee's property. The relief sought is confined exclusively to this assessment, which is alleged to be void, and wherever this is the case, this court and other courts have held that the averment of payment or tender of payment of the legal taxes need not be made." While the reason here advanced is in conflict with the doctrine of People's National Bank v. Marye, the result reached is in harmony with that decision, for the Indiana court could have reached the same conclusion on the ground that the legal portion of the taxes was in substance and effect paid or tendered, for the plaintiff in Yocom v. First National Bank did not attempt to

enjoin or tie up the collection of the entire tax, but sought only to enjoin the \$16,000.00 increase, alleged to be void. The action as thus instituted in no way interfered with the collection of the legal portion of the tax and was equivalent to payment or tender of the portion conceded to be due, inasmuch as the tax collecting officer had untrammeled power to collect the legal portion in the usual manner. Had the situation been such as to require enjoining the collection of the entire tax in order to reach the illegal portion, then the case would have come within the reason of the rule requiring tender. However, in *City of Jeffersonville v. Louisville & Jeffersonville Bridge Co.*,¹² wherein the plaintiff sought to enjoin the collection of taxes denominated *void* on account of the assessment having been made by a taxing board alleged to have no jurisdiction to assess the particular property at all, the Indiana Supreme Court nevertheless required an unconditional tender of the amount conceded to be due, and refused a temporary injunction because of the failure to make such a tender. While the case neither expressly overrules or distinguishes *Yocum v. First National Bank*, the decision is in harmony with *People's National Bank v. Marye*.

In *Cummings v. Merchants National Bank*,¹³ where the question was whether the rule adopted by the local boards of assessment was in conflict with the state constitution, the court held that it was, and that an assessment made under those circumstances was illegal, but that, nevertheless, the taxpayer was bound to pay the amount equitably due.

In order to give a court of equity jurisdiction, such payments or tender must be properly set up by averments in the complaint or petition, for an injunction will not lie to prevent the collection of taxes, a portion of which are conceded to be legally assessed, without an allegation in the complaint that the plaintiff has paid so much of the assessment as is lawfully due; or, an averment that he has tendered the same to

(12) 169 Ind. 645, 656.

(13) 101 U. S. 153.

the tax collector, and that he keeps the tender good by bringing the money into court for his benefit.¹⁴

Briefly, then, the law, as laid down by the United States Supreme Court, and followed almost unanimously by the decisions of the various state courts, is this: No one will be permitted to go into a court of equity to enjoin the collection of a tax until he has shown himself entitled to the aid of the court by paying, or tendering, so much of the tax assessed against him, as it can be plainly seen he ought to pay. The tender must be without the condition annexed of a receipt in full for all the taxes assessed and must be pleaded by proper averments. No tender of a void tax is necessary, but the unconstitutionality of the taxing law will not render the assessment such a void tax as can be enjoined without tender, unless there is a showing that the property is exempt from taxation, or that there is no law making the property liable to taxation.

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(14) *Morrison v. Jacoby*, 114 Ind. 84, 93; *Hewett v. Fenstamaker*, 128 Ind. 315.

EMINENT DOMAIN—SHADE TREES.

McEACHIN v. MAYOR, ETC., OF CITY OF TUSCALOOSA.

Supreme Court of Alabama, December 16, 1909.

Const. 1901, sec. 235 (Const. 1875, art 14, sec. 7), requiring municipal or other corporations and individuals, taking property for public use, to make just compensation for property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, gives one whose property is injured by improvements, etc., made under power of eminent domain, a right of action for resulting damage, irrespective of whether the fee of the property is in plaintiff or the taker, so that, if the removal of shade trees on the edge of a sidewalk in the improvement of the street by a city affected the value or enjoyment of the abutting property, the owner of such property would have a right of action against the city for damages, though he was not the owner of the trees and his right of ingress was not affected thereby.

ANDERSON, J.: Section 235 of the Constitution of 1901 (section 7, art. 14, of the Constitution of 1875) provides that "municipal and

other corporations and individuals invested with the privilege of taking property for public use, shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured or destroyed by the construction or enlargement of its work, highways or improvements," etc. The language used is plain and unambiguous, and requires compensation to the owner, not only for the property taken or destroyed, but for property injured, as the result of the construction or enlargement of the works, highways, or improvements. If injury is done to another's property by a corporation or individual invested with the privilege or exercise of the right of eminent domain, whether in acquiring the property for public use or in the enlargement or improvement of the property already acquired, the owner of the adjoining injured property is given a right of action, under our constitution, notwithstanding he has no such right under the law as it existed previous to the constitution of 1875. And it matters not whether the fee in the works or highway is in the offending municipality or the plaintiff. The plaintiff's right of action is not dependent on an ownership of the street, or of the earth removed or trees destroyed; but if her property was injured by the destruction of the trees, by the defendant, in and about the enlargement or improvement of the street, she is entitled to just compensation, under the very letter of the constitution. Nor does it make any difference whether the improvements made by the city did or did not exceed the existing necessities. *City of Montgomery v. Maddox*, 89 Ala. 181, 7 South. 433. It is true, in the Townsend case, reported in 80 Ala. 489, 2 South. 155, 60 Am. Rep. 112, and in 84 Ala. 478, 4 South. 780, this clause of our constitution received a more limited or restricted construction than is now given it; but said case was qualified by the Maddox case, supra, which we think is in line with the present holding. It is true the Maddox case was decided by an equally divided court; but the opinion of Justice Somerville, which was concurred in by Justice McClellan, was subsequently adopted and approved by this court in the case of *Avondale v. McFarland*, 101 Ala. 381, 13 South. 504, and the Townsend case was overruled.

We would make no war upon the opinion of Justice Sayre, as concurred in by the Chief Justice, if section 235 of the constitution did not exist, as it is a clear enunciation of the rule under the common law; but we do think it does not properly apply the terms of the present constitution to the facts in the case at bar, and that the distinction attempted between excavating and removing dirt from a street in front of a lot and in cutting down

and removing shade trees from the sidewalk is without a difference. This court has held that an abutting owner is entitled to any injury to the value of his property, caused by the lowering of the street or sidewalk, and not due solely to the destruction or impairment of his right of ingress and egress to and from his home; for as was said by Justice Somerville in the Maddox case, supra, in discussing the influence of our constitution: "If the contiguous proprietor of a house and lot is injured, in the sense of being damaged, by the grading of the street, * * * and by reason of this improvement the pecuniary value of such property is diminished, the owner is entitled to be compensated for the damage he has sustained." If a house is denuded of the shade trees in front of same, and it is thereby made less comfortable, or its beauty is impaired, so as to affect its use and enjoyment, and thereby render it less valuable, we see no reason why the owner would not be entitled to recover the damages sustained, whether his right of ingress and egress is affected or not. The question is: Was the pecuniary value of the property injured, as a result of the action of the defendant in the improvement or enlargement of its street? If it was, the plaintiff has a cause of action, and the amount of her recovery would be the difference in the value of her property before and after the improvement or enlargement of the street.

Nor do I think the authorities relied upon in the minority opinion in conflict with the holding in this case. They are inapt, as they were decided either under the common law or in states with no constitutional provision like ours. Indeed, as was said in the Maddox case, supra: "I do not discover precisely the same language in the constitution of any other state, except those of Alabama and Pennsylvania." Therefore, decisions on the subject in jurisdictions other than Alabama and Pennsylvania are of little value in dealing with the construction of this section of our own constitution, and, while there may have been some wabbling by the courts of these two states on this important subject, the more recent decisions of each of said states favor a liberal construction of this clause in favor of the property owner. "It is generally conceded that provisions of this character are remedial in nature, giving damages where none before were allowed, and that therefore they should be liberally construed to effect their object." *Maddox case*, supra. Indeed, I think there is an expression on page 230 of 109 Ala., and page 1 of 19 South. (31 L. R. A. 193, 55 Am. St. Rep. 930), in the Francis case, while not decisive of said case, that was intended as a warning signal against this court's falling into what

I consider the error of the minority. The court there emphasized the fact that it did not mean to hold that a city would be absolved from liability for cutting trees. True, it was qualified by the rule as to necessity; but the writer evidently overlooked the fact that this made no difference under the *Maddox case*.

It is needless to discuss the assignments of error in detail, as it is sufficient to say that the trial court proceeded under a misconception of the plaintiff's constitutional rights, and the judgment is reversed and the cause is remanded, in order that the issue may be tried under the rule we have attempted to lay down in this opinion.

Reversed and remanded.

NOTE—Destruction of Shade Trees by a City in Street Improvement.—It may be conceded that the constitutional clause quoted in the opinion in the principal case extends the rule under the common law, but to our mind this does not save the conclusion reached therein from being a very extraordinary decision. It resembles somewhat late holdings by the federal supreme court, to which three members of that court dissented, that the denial of further comity, according to former conditions, to a foreign corporation, may amount to a denial of the equal rights guaranteed by the Fourteenth Amendment. *Southern Ry. Co. v. Greene*, 30 Sup. Ct. 287.

The principal opinion concedes that a street may be opened and, necessarily, that trees left standing there may be removed. Necessarily, further it concedes it may be opened to its full width, but, if this is not done, such trees as are left remain by leave or license of a municipality. Therefore, the ruling is, in effect, to say that where the original non-exercise of a city's right to remove a shade tree has resulted in pecuniary benefit to abutting property, the subsequent exercise of that original right has become conditioned. It seems to us remarkable that the forceful method adopted by Judge Sayre, with whom concurred the Chief Justice, to show that here was a plain case of *damnum absque injuria* did not impress itself upon the majority. The ultimate analysis of this ruling is, that a municipality cannot remove an obstruction in a street, if an abutter is interested pecunia*ri*ly in its remaining there, without making compensation therefor.

In *City of Atlanta v. Halliday*, 96 Ga. 546, 23 S. E. 509, it was ruled that, where the public owns the fee of the street, the municipality may remove obstructions at discretion, and the abutter has no right of action therefor. And even where the abutter's title extends to the center of the street, he merely has the right, as owner of the trees thereon, only to use them in such way as not to interfere with the right of the public to use and improve the street for travel. *Glencoe v. Reed*, 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901; *Bigelow v. Whitecomb*, 72 N. H. 472, 57 Atl. 680, 65 L. R. A. 676.

We have supposed heretofore, that about the only serious question on the subject of the right of abutting owner to damages for injury or destruction of shade trees were in those cases where telegraph or telephone companies or some

third person injured or destroyed them, though having a permit by a city. Thus in *Cartwright v. Liberty Telephone Co.*, 205 Mo. 126, 103 S. W. 982, 12 L. R. A. (N. S.) 1125, in the opinion by Woodson, J., it is said. "It (the company) contends that the erection and maintenance of telephones are a proper use of a street. The owner of the adjoining premises cannot claim damages resulting thereto from user of a street; and cite the following authorities in support of that contention (giving a long list of Missouri cases). We do not understand that the respondents controvert the rule above contended for in a proper case." Then the court shows it is on the side of the contention that a city could authorize a telephone company to use the trees on a street without it becoming liable to an abutter for damages. As the telephone company had not obtained a permit it was deemed a trespasser and liable to the abutter for damages. The opinion also says: "According to the laws of this state, the property owner in cities, towns and villages own the land to the center of the adjoining street, subject to the easement of the city. It has the right to subject the street to any and all the uses or purposes for which the street was acquired; but, until it does so subject it to one or more of those uses, or so long as he and the city can jointly occupy and use the street without doing violence to the full free and complete exercise of the public easement," he is to that extent just as much the owner of the property to the center of the street as he is of the remainder of the lot, and has the same right to use it in any manner and for any purpose he may see proper, not inconsistent with the rights of the public."

In *Bronson v. Albion Teleph. Co.*, 67 Neb. 119, 93 N. W. 201, 60 L. R. A. 426, it was held that the question of the liability of a telephone company for the removal or destruction of trees necessary in the construction of its line depended upon whether the use of a highway for poles and wires was contemplated in a highway dedicated or condemned or was a new and additional burden. If the latter, the abutting owner is entitled to compensation. "We apprehend there cannot be any question about a city having power to remove an obstruction in a street, whether it be tree or anything else, and whether it be on the side or center of a street."

It is conceded, however, that courts have held, that a city has not unlimited discretion to remove valuable shade trees. There must be some reasonable necessity therefor. See *City of Atlanta v. Holliday*, *supra*; *Frostburg v. Wineland*, 58 Md. 239, 56 Atl. 811, 103 Am. St. Rep. 390, 64 L. R. A. 627; *Stretch v. Cassopolis*, 125 Mich. 167, 84 N. W. 51, 84 Am. St. Rep. 51, 51 L. R. A. 345.

Thus the *Frostburg* case held, in an injunction case, that trees which had been standing for forty years without impeding the travel on a public highway could not be removed, where in a proposed plan, for the improvement of the highway with a slight circular turning of the curb water could be carried in the gutter around the trees, its flow not being interfered with, nor the improvement of the street in a workmanlike manner. The court said: "The best adjudicated cases hold that shade trees in a highway are not a nuisance *per se*, and only become so when they obstruct or interfere with the use of the highway

or street." How the right of a municipality can be deemed paramount in the free, unobstructed use of a street, and removal of a shade tree that is an obstruction not be *damanum absque injuria* is to us incomprehensible. C.

JETSAM AND FLOTSAM.

IT IS SOMEBODY'S MOVE.

The following editorial in Scrips McRea League papers has been printed in over two hundred leading dailies of America:

"Within the past month some half million or more American citizens have read a terrible story that has been printed about Judge Peter S. Grosscup of the United States Circuit Court. The story, which has been printed in installments, marshals an array of charges ranging all the way from nasty village gossip and scandal to documents (hitherto unpublished) from the files of the government at Washington.

"These charges, involving, as they do, misconduct as a man and misconduct as a judge, are either true or they are false. Judge Grosscup, so far as can be learned, has taken no steps in the matter. The government at Washington has done nothing. The United States district attorney and the federal grand jury seem to have done nothing.

"It is not sufficient to say that these publications have been made by a Socialist newspaper. The point is that these things have been published broadcast, and are rapidly becoming matters of common discussion. We believe in freedom of the press, and the best way to secure that freedom is to punish abuses of it. If the socialist newspaper has not told the truth, if it has libeled the United States judge, then it should be dealt with according to law.

"But if all hands sit silent, then it is the judge himself and the proper government officials who will be more guilty than the socialist editor of bringing contempt upon the courts. For unless the stories can be disproved and the writer punished, Grosscup ought not to sit another hour upon the federal bench."

BOOK REVIEWS.

AMERICAN ELECTRICAL CASES, VOL. IV., WITH ANNOTATIONS.

This volume runs from 1904 to 1908, inclusive. The cases reported refer to the official and west system, with volume and page. Practically every case carries an annotation at the bottom of the pages, some of the annotations being monographs of extensive treatment. This volume is a book of nearly 1,200 pages, and thus some idea is conveyed of the prominence of this class of cases, putting it in a class like railway cases, to which reports are especially devoted.

The indexing of reports like these shows their importance and how questions relating to electricity may be more easily run down. For example, we find in the index to this volume such headings as "Attractive Nuisances," "Belt,"

"Conduits," "Crossing of Wires," "Electrolysis," "Guard Wires," "Insulation," etc.

The volume is in law buckram, of typographical excellence, and issued from the publishing house of Matthew Bender & Co., Albany, N. Y., 1910.

BOOKS RECEIVED.

A Student's Text on the Law of Principal and Agent. By Sherman Steele, Lecturer on Agency in St. Louis University School of Law. Chicago. T. H. Flood & Co. 1909. Review will follow.

The Corporation Manual. Statutory provisions relating to the organization, management, regulation and taxation of domestic business corporations, and to the admission, regulation and taxation of foreign corporations in the several states and territories of the United States, arranged under a uniform classification. Corporation laws of Alaska, Philippine Islands and Porto Rico, federal statutes affecting business corporations, and digest of business corporation laws of Mexico. And encyclopedia of corporation forms and precedents. Edited by John S. Parker, of the New York bar. Sixteenth edition. Corporation Manual Company, 34 Nassau street, New York. 1910. Review will follow.

Municipal Franchises. A description of the terms and conditions upon which private corporations enjoy special privileges in the streets of American cities. By Delos F. Wilcox, Ph.D., Chief of the Bureau of Franchises of the Public Service Commission for the First District of New York. In two volumes. Vol. I. Introductory—Pipe and Wire Franchises. Rochester, N. Y. The Gervaise Press. Distributing sales Agents, Engineering News Book Department. New York. 1910. Review will follow.

HUMOR OF THE LAW.

WANTED HER DIVORCE.

The following letter was received by an Oklahoma attorney:

August the 23 1909.
Oklo.

Mr K dear Sire
I Will rite you a few lines to See if you are Still giten my devorse are not I want my devorse this SePtember Cort Be Shure and git it and When yu Want me to Come yu can let me now I Want the devorse shure yu rite me a Card as quick as yu git this letter So I Will now from Miss M— B—
I saw the nams in the Paper But mine and didnen now what to due and yu rite me a Card So I will now rite now

to Mr. Jug (Judge) k.

Prisoner—Your Honor, I consider this a free country, and therefore I should not have been arrested for being in a free fight.

Judge—Your point is well taken, but this is also a fine country. If it permitted fights it wouldn't be fine. Therefore we shall omit the free and consider the fine. Ten dollars and costs.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Adverse Possession**—Evidence.—Occupation of land by tenant for a few years, the occasional cutting of small timber for mine props, and the taking of tan bark therefrom, together with the payment of the taxes, held insufficient to establish title by adverse possession.—Mahoning Coal Co. v. Dowling, Ky., 124 S. W. 370.

2. **Attorney and Client**—Nature of Relation.—The relation between attorney and client rests upon essentially the same basis of trust and confidence as the relation between tenants in common.—Hill v. Coburn, Me., 75 Atl. 67.

3. **Bailment**—Conversion.—A bailee, charged with conversion, cannot defend refusal to deliver the property to plaintiff because others claimed it, where he did not deliver the property to anyone.—Riddle v. Blair, Ala., 51 So. 14.

4. **Bankruptcy**—Discharge.—Confirmation of a compromise by the bankruptcy court works a discharge by operation of law, and bars all remedies for the enforcement of claims.—Hurner v. Hudson, Me., 75 Atl. 45.

5. **Banks and Banking**—Insolvency.—An insolvent bank, known to be so by its officers, is a trustee *ex maleficio* of the deposits received.—Furber v. Dane, Mass., 90 N. E. 859.

6.—National Banks.—In an action by a national bank on a loan, evidence of statements by defendant to plaintiff regarding the ownership of land held admissible on the question of notice, though under the provisions of the banking act a national bank may not loan money on real estate security given directly to the banks.—National Bank of North America in New York v. Thomas, R. I., 74 Atl. 1092.

7.—Payment of Check Improperly Signed.—A bank having paid the check of a company signed only by its president, when by agreement of the bank and company its checks were also to be countersigned by another officer, held the bank was liable for the amount to the com-

pany's receiver.—Ellis v. Western Nat. Bank, Ky., 124 S. W. 334.

8. **Bills and Notes**—Execution.—The payee of an instrument in the form of a note could not sign the maker's name thereto and make his mark; the maker touching the pen staff.—Penton v. Williams, Ala., 51 So. 35.

9. **Boundaries**—Footsteps of Surveyor.—Where footsteps of a surveyor are found and identified, they must control, and all classes of cases must yield to them.—Taft v. Ward, Tex., 124 S. W. 437.

10. **Brokers**—Contracts.—Where a contract employed a broker to purchase timber options for a percentage of the profits, he was not entitled to a percentage of the profits derived from a sale of the land necessarily purchased in order to obtain the timber thereon.—Wilson v. James, Wash., 106 Pac. 619.

11. **Carriers**—Personal Baggage.—A carrier receiving a trunk for carriage by freight without notice that it contains money held liable for the larceny of money by an agent of the carrier in whose immediate care the trunk is placed.—Chesapeake & O. Ry. Co. v. Hall, Ky., 124 S. W. 372.

12.—Rate for Switching Cars.—A rate for switching cars which has been continued in force a considerable time is presumed reasonable and remunerative.—Northern Pac. Ry. Co. v. Railroad Commission of Washington, Wash., 106 Pac. 611.

13.—Refusal to Sell Ticket.—A carrier's refusal to sell tickets for a flag station established by the railroad commission held tortious, for which general or special damages may be recovered.—Georgia R. & Banking Co. v. Greer, Ga., 66 S. E. 961.

14. **Contracts**—Abandonment.—Where a party contracted to build a vessel for plaintiffs, but abandoned the contract because of lack of funds, and plaintiffs completed it themselves, the fact that the contractor voluntarily and without compensation remained on the job as overseer did not constitute a new contract superseding the former one.—Russell v. Ross, Cal., 106 Pac. 583.

15.—Building Contracts.—If, under a building contract requiring the work to be done to the satisfaction of the owner, the owner fails to be satisfied with that which ought to satisfy him, there may be a recovery on a quantum meruit.—Handy v. Bliss, Mass., 90 N. E. 864.

16.—Express and Implied Terms.—The express mention in a contract of what would be otherwise fairly implied cannot change its nature, nor the rights of the parties.—Fosburgh Co. v. Hampden County, Mass., 90 N. E. 851.

17.—Implied Contract.—A party leasing premises for saloon purposes cannot recover damages from the owner because he is unable to continue his business through the refusal of the owner to sign his petition for a license.—Lansdowne v. Reihmann, Ky., 124 S. W. 353.

18.—Validity.—A contract to pay a certain sum held not rendered void by the further agreement to make payments from profits of a bucket shop till such sum is paid.—Williams Commission Co.'s Assignee v. W. A. Shirley & Bro., Ky., 124 S. W. 327.

19. **Corporations**—Apparent Authority of Officers.—A particular course of business by a corporation through its president may create apparent authority to do acts which in point of

fact the officer had been inhibited from doing by the directors.—*Tyler Estate v. Hoffman*, Mo., 124 S. W. 535.

20.—**Purposes.**—Rev. St. 1895, art. 642, subd. 14, while authorizing the formation of a corporation for a business consisting of manufacturing and mining, held not to authorize the formation of such corporation for two businesses—one of manufacturing and the other of mining.—*Johnson v. Townsend*, Tex., 124 S. W. 417.

21.—**Transfer of Stock Certificate.**—A bona fide transferee of a stock certificate is entitled to recognition by the corporation without litigating his title with a third person claiming under a certificate previously surrendered.—*State ex rel. Louisiana State Bank of Baton Rouge*, La., 51 So. 95.

22. **Criminal Evidence—Admission by Counsel.**—Silence of one accused at a judicial hearing is not an implied admission of the truth of statements made in his presence; but in a criminal prosecution admission of fact made at the trial in open court by the accused or his counsel may be considered by the jury.—*Godwin v. State*, Del., 74 Atl. 1101.

23.—**Insanity.**—Where there is evidence of personal manifestations of the insanity of accused, proof of hereditary tendency held admissible as supporting such evidence.—*People v. Gambacorta*, N. Y., 90 N. E. 809.

24. **Criminal Law—Weight of Evidence.**—In a prosecution for larceny, the jury could believe the evidence of the prosecution, though very weak, and reject accused's statement that he took the property under a bona fide claim of right.—*Thomas v. State*, Ga., 66 S. E. 964.

25.—**Continuance.**—The refusal of a continuance for the absence of a nonresident witness could not be sustained because there was no certainty that his presence could be obtained at any term of court, since Cr. Code Prac. sec. 153, authorizes a defendant to take depositions of a nonresident witness.—*Settle v. Commonwealth*, Ky., 124 S. W. 393.

26.—**Jurisdiction.**—Where a court of general jurisdiction exercises special jurisdiction and adopts procedure in derogation of the common law practice, jurisdictional facts must be averred and proved.—*Godwin v. State*, Del., 74 Atl. 1101.

27.—**Maintaining Liquor Nuisance.**—In a prosecution for maintaining a liquor nuisance, prior convictions of accused for maintaining a liquor nuisance in another place are not admissible to show his intent.—*State v. Bartley*, Me., 74 Atl. 1129.

28. **Damages—Measure of Damages.**—The measure of damages for the breach by the vendee of the contract for the purchase of land is the difference between the contract price and the market value of the land on the day the sale was to have been completed.—*Norris v. Letchworth*, Mo., 124 S. W. 559.

29. **Deeds—Construction.**—A clause in the description in a deed cannot be disregarded, although in conflict with other clauses, where the other clauses do not describe the land with such definiteness that there can be no doubt as to the land meant.—*Chattahoochee & G. R. Co. v. Pilcher*, Ala., 51 So. 11.

30. **Easements—Extinguishment.**—An easement acquired by prescription is extinguished when the land is taken for public uses under the right of eminent domain.—*Currie v. Bangor & A. R. Co.*, Me., 75 Atl. 51.

31. **Ejectment—Pleadings.**—Where plaintiffs suing to recover land based their claim on a deed to A., and there was a latent ambiguity in it, it was unnecessary for defendant to plead this ambiguity.—*Justice v. Justice*, Ky., 124 S. W. 351.

32.—**Title to Property.**—One who claims title to property, and is in possession of the same, may sue in ejectment.—*Gibson v. McGurkin*, Utah, 106 Pac. 669.

33. **Elections—Buying Votes.**—An indictment under Acts 1905, p. 111, making it a misdemeanor to buy or sell a vote at a primary election, held not defective because failing to allege that the person whose vote was bought was a registered voter.—*Lepinsky v. State*, Ga., 66 S. E. 965.

34. **Electricity—Care Required.**—Where the wires of a telephone company and of an electric lighting company were strung on a pole belonging to a telephone company, together with fire and police wires of a city, held that each of the companies were bound to anticipate the use of the telephone pole by the city's employees in inspecting its wires.—*Beaming v. South Bend Electric Co.*, Ind., 90 N. E. 786.

35.—**Negligence.**—It is the duty of a lighting company carrying electricity by its wires through the streets in dangerous quantities, not only to make the wires safe by proper insulation, but to keep them so by vigilant oversight and repair.—*Dow v. Sunset Telephone & Telegraph Co.*, Cal., 106 Pac. 587.

36. **Eminent Domain—Consequential Damages.**—In assessing consequential damages to abutting property caused by grading a street and constructing a street railway thereon, special benefits accruing to the property must be considered and set off against the damages.—*Bragan v. Birmingham Ry., Light & Power Co.*, Ala., 51 So. 30.

37. **Equity—Pleading.**—An objection that the bill in proceedings for the settlement and dissolution of a partnership contained no averment imputing fraud, bad faith, or culpable negligence to the managing members of a partnership, in consequence of which losses described resulted, is properly asserted by demurrer.—*Northern v. Tatum*, Ala., 51 So. 17.

38. **Estoppel—By Deed.**—While the husband is estopped to deny recitals in a conveyance to his wife, to which he was a party, his forced heirs are not so estopped.—*Succession of Graf*, La., 51 So. 115.

39.—**Contract.**—Where defendant had agreed in writing to sell plaintiff his farm, and subsequently told plaintiff he would secure a loan for him, held that he was not estopped to repudiate this promise by the fact that plaintiff relied upon it, there being no consideration for the promise.—*Norris v. Letchworth*, Mo., 124 S. W. 559.

40.—**Title to Land.**—Where a vendor, after contracting to sell land, filed a sworn petition asking the appointment of a guardian for his insane wife, alleging that the property was community property, he cannot afterwards say that the wife had no interest in the property, and insist that the purchaser accept his conveyance as a marketable title.—*Colpe v. Lindblom*, Wash., 106 Pac. 634.

41. **Evidence—Attesting Witness.**—Where a contract on its face purports to have been executed out of the state, it will be presumed, in the absence of evidence, that the attesting wit-

ness is a nonresident, so as to permit his signature to be proved.—Mobile, J. & K. C. R. Co. v. Hawkins, Ala., 51 So. 37.

42.—**Bill of Exceptions.**—A bill of exceptions is inadmissible to prove the testimony of a witness on a former trial.—Central of Georgia Ry. Co. v. Carleton, Ala., 51 So. 27.

43.—**Common law of Sister State.**—In an action by a servant for injuries received in another state, where no statute of that state, relating to the subject is pleaded, it will be presumed that the common law is in force in that state.—Whitfield v. Louisville & N. R. Co., Ga., 66 S. E. 973.

44.—**Consideration of Deed.**—The words of a deed are open to explanation by parol proof as to the amount, kind, and receipt of consideration.—Shehy v. Cunningham, Ohio, 90 N. E. 805.

45.—**Failure of Consideration.**—In an action on a note reciting the consideration as "value received," by the original holder, defendant could show that the consideration was personal property as to which the warranties made by the seller have failed.—Pidcock v. J. Crouch & Son, Ga., 66 S. E. 971.

46.—**Town Records.**—In an action against a town on a debt, records of the town held *prima facie* evidence of indebtedness in excess of the constitutional limitation.—Leavitt v. Town of Somerville, Me., 75 Atl. 54.

47. **Exchange of Property—Breach of Warranty.**—Where plaintiff traded his mules for a horse falsely represented by defendant to be sound, plaintiff could either sue for a breach of warranty or for the return of the mules.—Talbott v. Krahwinkle, Ky., 124 S. W. 323.

48. **Executors and Administrators—Establishment of Claim.**—In a proceeding to recover from distributees on an obligation of decedent to account for personalty held in trust, and to reach property in the hands of distributees to satisfy the claim, the executor or administrator held a necessary party.—Mathewson v. Wakelee, Conn., 75 Atl. 93.

49. **Forgery—Intent.**—If a check was intended to be payable to accused, his indorsement thereof was lawful, though it described him by a different name.—State v. Anderson, Del., 74 Atl. 1097.

50. **Frauds, Statute of—Letters to Third Person.**—Letters and memoranda signed by the party to be charged may be a sufficient memorandum of a contract within the statute of frauds, though not intended for the other party or known to him, if they are otherwise sufficient.—Jacobson v. Hendricks, Conn., 75 Atl. 85.

51.—**Letters Written by Party to Be Charged.**—Letters written by the party to a sale other than the one to be charged held admissible as part of the memorandum required by the statute of frauds.—Weymouth v. Goodwin, Me., 75 Atl. 61.

52. **Guaranty—Performance by Creditor.**—An offer to guarantee an indebtedness if plaintiff would continue the debtor's account for the next month, held to be obligatory on a promise to the debtor to continue the account.—Lascelles v. Clark, Mass., 90 N. E. 875.

53.—**What Constitutes.**—A mere request by one to give credit to another does not create a legal liability to pay the debt.—Goldring v. Thompson, Fla., 51 So. 46.

54. **Gifts—Inter Vivos.**—A gift of the donor's check subject to a written memorandum stipulating that the check shall not be payable until after the donor's death, held not a valid gift *inter vivos*.—Foxworthy v. Adams, Ky., 124 S. W. 381.

55. **Highways—Duty of Travelers Toward Each Other.**—A person with an automobile and a person with a team must each exercise his rights with due regard to the corresponding rights of the other.—Gurney v. Piel, Me., 74 Atl. 1181.

56. **Homestead—Right of Surviving Husband.**—The amount paid by the surviving husband for permanent street improvements in front of the homestead, after the death of the wife, held properly deducted from proceeds of a sale of the premises in determining the amount the only child of the surviving husband and deceased wife is entitled to.—Mattingly v. Kelly, Tex., 124 S. W. 483.

57. **Homicide—Intent.**—The court having submitted, as a predicate for a conviction on a prosecution for murder, a whipping with a belt strap, not a deadly weapon, held, Pen. Code, art. 717, as to considering, on the question of intent, the instrument with which a homicide is committed, should have been given.—Betts v. State, Tex., 124 S. W. 424.

58.—**Intent.**—The intent to commit murder on a trial for assault with intent to murder may be inferred from proof of the use of a deadly weapon.—State v. Moore, Del., 74 Atl. 1112.

59. **Husband and Wife—Action for Alienation of Husband's Affection.**—An action by a wife for the alienation of her husband's affection, held to accrue at the time the husband and wife separated so that the action was barred in two years.—Farneman v. Farneman, Ind., 90 N. E. 775.

60.—**Community Property.**—A wife as survivor of the community has no power to transfer community property by deed for the purpose of carrying out an unenforceable contract between her deceased husband and another.—Brooks v. Payne, Tex., 124 S. W. 463.

61.—**Earnings of Wife.**—Earnings of a married woman derived from caring for the infant children of her deceased cousin under a contract with their father held her separate property.—Elliott v. Atkinson, Ind., 90 N. E. 779.

62.—**Gifts Inter Vivos.**—A gift of a note by the payee to his wife held not a valid gift *inter vivos*.—Foxworthy v. Adams, Ky., 124 S. W. 381.

63.—**Property Acquired After Marriage.**—The law of the domicile controls as to personal property acquired during coverture.—Colpe v. Lindholm, Wash., 106 Pac. 634.

64. **Inn-Keepers—Fire Escapes.**—One, having the time and opportunity to learn of the condition of a lodging house as to fire escapes, by voluntary remaining in the building assumed the danger of any failure to provide adequate escapes.—Radley v. Knepfley, Tex., 124 S. W. 447.

65. **Intoxicating Liquors—Aiding Maintenance of Liquor Nuisance.**—One who aids in maintaining a liquor nuisance may be charged as a principal.—State v. Bartley, Me., 74 Atl. 1129.

66.—**Licenses.**—Upon application of a corporation for a brewer's license under Act June 9, 1891 (P. L. 257), held that the corporation's

unfitness may be shown by illegal acts of its officers or authorized agents.—*In re Indian Brewing Co.'s License*, Pa., 75 Atl. 29.

67. **Judgment—Conclusiveness.**—To render a former judgment conclusive on any matter, it must appear that the precise point was in issue and decided.—*House Cold Tire Setter Co. v. Ingraham*, Conn., 75 Atl. 80.

68. **Findings of Fact.**—When the ultimate fact is found, the judgment rests on it, and not on the probative facts.—*Sierra Nevada Lumber Co. v. McCormick*, Utah, 106 Pac. 666.

69. **Setting Aside Default.**—A default judgment may not be set aside where no affidavit of merits is filed.—*Pearce v. Butte Electric Ry. Co.*, Mont., 106 Pac. 563.

70. **Life Insurance—Misrepresentations.**—Provision of policy that, if age has been misstated, the benefits will be equitably adjusted, and that after two years the policy will be contestable, are both effective.—*Mutual Life Ins. Co. of New York v. New*, La., 51 So. 61.

71. **Time for Suing.**—Where an insurer with prompt notice of loss denies all liability, he cannot complain that insured did not observe the provision requiring him to wait 60 days after proof of loss before suing.—*Phoenix Ins. Co. v. Hartford v. Flowers*, Ky., 124 S. W. 404.

72. **Waiver of Lapse.**—A provision in a life policy and in a premium note, that the policy should lapse by failure of insured to pay the note, being wholly for the insurer's benefit, is one which it may waive, and such waiver may be express or by such conduct as evinces the purpose not to enforce it.—*New York Life Ins. Co. v. Evans*, Ky., 124 S. W. 376.

73. **Life Estate—Enhancement in Value.**—The enhancement in the value of corporate stock while in the hands of the life tenant, with gift over, belongs to the remainderman.—*Bains v. Globe Bank & Trust Co.*, Ky., 124 S. W., 343.

74. **Title of Remainderman.**—The title of remainderman cannot be destroyed by any act of the life tenant.—*Hall v. Condon*, Ala., 51 So. 20.

75. **Limitation of Actions—Mistake.**—The statute of limitation began to run against the right of a county to surcharge a sheriff's tax collection settlement when a mistake therein was discoverable by the exercise of reasonable diligence.—*Alexander v. Owen County*, Ky., 124 S. W. 386.

76. **Notes Payable on Demand.**—A note payable on demand is barred in six years after its date.—*Brooklyn Bank v. Barnaby*, N. Y., 90 N. E. 834.

77. **Part Payment.**—Payments by one indebted for board held to stop the running of limitations and to create a new period for limitations.—*Brown's Adm'r v. Osborne*, Ky., 124 S. W. 405.

78. **Logs and Logging—Right to Remove Timber.**—A deed to standing timber providing for removal within three years held to limit the grantee's right to timber actually removed within the time specified.—*Allen & Nelson Mill Co. v. Vaughn*, Wash., 106 Pac. 622.

79. **Malicious Prosecution—Defenses.**—It cannot be presumed that a magistrate was a practicing lawyer, so as to constitute a defense to an action for malicious prosecution.—*Stephens v. Gravitt*, Ky., 124 S. W. 414.

80. **Master and Servant—Guards for Machinery.**—If a servant does not require further safeguards to machinery, and so takes the chance of injury, he cannot recover for an injury therefrom.—*Wiley v. Batchelder*, Me., 75 Atl. 47.

81. **Injury to Servant—Trainmen.**—Trainmen may presume that flagmen and other employees on or near the track will keep out of danger, and the railroad is not liable for an injury to them unless the trainmen have good reason to believe that the employees will not keep out of danger, and then fail to use proper means at their command.—*Wilkerston v. St. Louis & S. F. R. Co.*, Mo., 124 S. W. 543.

82. **Mechanics Lien—Persons Entitled to Lien.**—Laws 1905, p. 137, c. 72, giving a lien to blacksmiths, wagon makers, machinists, boiler makers, etc., does not include plumbers, painters, plasterers, and like artisans.—Modern

Plumbing & Heating Co. v. American Soda Fountain Co., Wash., 106 Pac. 628.

83. **Mines and Minerals—Conveyance and Contracts.**—A covenant to convey the mineral in a part of certain lands of a party, together with all necessary mining rights, included a conveyance of such easements in the balance of the land as were necessary to accomplish the mining and removal of the material.—*Neal v. Finley*, Ky., 124 S. W. 348.

84. **Municipal Corporations—Acceptance of Bids.**—Where a city ordinance was passed authorizing a street improvement, and plaintiff submitted a bid for the work, an acceptance thereof by resolution providing that the work be completed within 30 days held not to inject a new condition into the contract, so as to render the acceptance incomplete.—*Platte City v. Paxton*, Mo., 124 S. W. 531.

85. **Illegal Payment of Claim.**—Where a claim against a town is allowed and paid in violation of an express statute, it is no defense to a suit to recover the money that the parties acted in good faith.—*Campbell v. Brackett*, Ind., 90 N. E. 777.

86. **Liability for Acts of Officers.**—An incorporated town is not liable for the acts of its mayor and marshal in enforcing, without malice, an illegal ordinance by imprisoning one violating it.—*Franks v. Town of Holly Grove*, Ark., 124 S. W. 514.

87. **Ordinance as to Fire Escapes.**—An ordinance requiring the third story of a building to be constructed as stated, in order to provide escapes from fires, held unreasonable and void.—*Radley v. Knepply*, Tex., 124 S. W. 447.

88. **Proximate Cause.**—It is not necessary to make one liable for negligent injuries that he should have anticipated the particular accident if conditions were negligently permitted to exist or continue from which it might reasonably have been anticipated.—*Beaming v. South Bend Electric Co.*, Ind., 90 N. E. 786.

89. **Negligence—Place Attractive to Children.**—A telephone company in possession of a vacant lot as a licensee, while constructing a telephone line across it, held to owe no duty to children trespassing thereon, except not to injure them wantonly.—*Hall v. Missouri & Kansas Telephone Co.*, Mo., 124 S. W. 557.

90. **Navigable Waters—Rights of Public.**—The public has not such an unqualified right to a stream navigable for floatage only for a part of the year as in those navigable for all purposes, and such right cannot be exercised so as to prevent the utilization of the water power, or such other reasonable uses as the public may make.—*Blackman v. Mauldin*, Ala., 51 So. 23.

91. **Riparian Rights.**—The damming of a stream, navigable a portion of the year to create artificial freshets for floating logs, may be restrained.—*Flinn v. Vaughn*, Ore., 106 Pac. 642.

92. **Nuisance—Noise and Smoke.**—It is not necessary that the health of plaintiff or any member of his household should have been impaired to entitle him to restrain a nuisance caused by noise and smoke from a gas factory.—*Judson v. Los Angeles Suburban Gas Co.*, Cal., 106 Pac. 581.

93. **Officers—Officers Defacto.**—In controversies to which he is not a party, the title to his office of an officer de facto and his acts therein cannot be questioned.—*Stuart v. Inhabitants of Ellsworth*, Me., 75 Atl. 59.

94. **Salaries.**—Legislation affecting the compensation of an officer will not be presumed as intended to apply to an incumbent, unless the legislature expressly so declares.—*Crockett v. Mathews*, Cal., 106 Pac. 575.

95. **Partnership—Expenses and Losses.**—Where the articles of partnership do not otherwise provide, the expenses and losses of a partnership are to be borne by all the members in the proportion they share in the profits; and losses occasioned by conduct or omission of a managing partner will not be charged against him, unless he has been guilty of fraud, bad faith or culpable negligence.—*Northern v. Tatnum*, Ala., 51 So. 17.

96. **Partition—Pleading.**—The meaning of and persons included by the phrase in a deed to a person for life with remainder to "her children," under which complainants claim as tenants in

common in remainder after the death of the life tenant, cannot be determined by a demurrer to the bill for partition.—*Hall v. Condon*, Ala., 51 So. 20.

97. Perpetuities—Power.—An appointment exercised under a will authorizing the appointment as devisees of the residue of testator's estate such of his legal heirs at his wife's death as she might designate in her will, held not to contravene the statute against perpetuities.—*Heald v. Briggs*, Conn., 74 Atl. 1123.

98. Principal and Agent—Payment to Agent.—Where money has been paid to an agent for his principal, and is recoverable back from the principal, the agent is liable until he has paid over the money to his principal.—*Pancoast v. Dinsmore*, Me., 75 Atl. 43.

99. Process—Amendments.—Voidable process is amendable, but void process is not.—*Roy v. Phelps*, Vt., 75 Atl. 13.

100. Quieting Title—Evidence of Possession.—On proof of legal title by plaintiff in an action to quiet title, it will be presumed, in the absence of evidence to the contrary, that he was entitled to the actual possession.—*Gibson v. McGurren*, Utah, 106 Pac. 669.

101. Railroads—Duty to Public.—A railroad exercising a franchise to operate steam locomotives across a street cannot shift the responsibility for the exercise of such right to an agent who, by its authority, actually exercises it.—*Black v. Rock Island, A. & L. R. Co.*, La., 51 So. 82.

102.—Injury to Intoxicated Passenger.—The fact that a passenger had by voluntary intoxication incapacitated himself from exercising ordinary care held not to excuse the conductor for forcing him from a place of safety to one where it would require extraordinary care to avoid injury.—*Central of Georgia Ry. Co. v. Carleton*, Ala., 51 So. 27.

103. Ejection of Passenger.—One who refuses to pay his fare may be ejected, though he afterwards offers to pay his fare when the train is stopped to elect him.—*Freeman v. Costley*, Tex., 124 S. W. 458.

104. Removal of Causes—Diversity of Citizenship.—A suit by a state to collect taxes on property omitted from taxation is not removable to the federal court under U. S. Comp. St. 1901, p. 509; there being no diversity of citizenship.—*Darnell v. State*, Ind., 90 N. E. 769.

105. Reward—Return of Escaped Convict.—Under Ky. St., sec. 1936, providing a reward for the capture and return of an escaped convict a party was entitled to a reward although the convict, because of injuries had abandoned the idea of escape, and asked him to return her to the prison.—*Mudd v. Woodside*, Ky., 124 S. W. 321.

106. Sales—Construction of Contract.—The words "net to us," in a telegram sent by plaintiffs offering to sell butter to defendant for 17 cents per pound "net to us," meant that the price was to be 17 cents free from all charges and deductions.—*Floral Creamery Co. v. Dillon & Douglass*, Conn., 75 Atl. 82.

107.—Recovery of Goods by Seller.—One selling an article, title to remain in him till paid for, held entitled to maintain replevin thereon on default of payment.—*Kerl v. Smith*, Miss., 51 So. 3.

108. Set-Off and Counterclaim—Assigned Claims.—In an action by a consignor of produce against the consignee, on his own claim and others assigned to him, held that defendant was entitled to deduct, as against the entire mass, for unmarketable produce not identified as belonging to any particular consignor.—*Kempe v. Johnson*, Wash., 106 Pac. 619.

109.—Construction of Statute.—Statutes of set-off are favored in law, and reasonable regard must be given to the spirit of the statute.—*Stewart v. Knight*, Vt., 75 Atl. 12.

110.—Equitable Set-Off.—A party sued for goods sold by a non-resident having no property in the state and no agent upon whom service could be made may set up as an equitable set-off the breach of another contract with plaintiff for the purchase of other goods.—*Ewing Merle Electric Co. v. Lewisville Light & Water Co.*, Ark., 124 S. W. 509.

111. Specific Performance—Necessity of Tender.—Where a party covenanted to convey the mineral in certain lands on payment of a certain sum, his refusal to convey on demand was a waiver of tender by the purchaser giving him an immediate action for specific performance.—*Neal v. Finley*, Ky., 124 S. W. 348.

112.—Oral Contract for Sale of Land.—An oral contract of sale of an interest in land will not support an action for specific performance.—*King v. Upper Wash.*, 106 Pac. 612.

113. Taxation—Creditor's Bill.—A creditor's bill may be brought to collect a tax.—*Darnell v. State*, Ind., 90 N. E. 769.

114. Telegraphs and Telephones—Delay in Delivery of Messages.—The validity of a stipulation, in a contract made in a sister state for the transmission of a message, held determined by the law of the forum as a stipulation affecting the remedy.—*Western Union Telegraph Co. v. Douglass*, Tex., 124 S. W. 488.

115. Trial—Conflict Between Special Answer and General Verdict.—It is only when the conflict between a special answer and the general verdict is beyond the possibility of reconciliation by any evidence admissible under the issues that the general verdict will fall.—*Union Traction Co. of Indiana v. Howard*, Ind., 90 N. E. 764.

116.—Reception of Evidence.—The court can of its own motion confine the testimony within legal bounds.—*Bragan v. Birmingham Ry., Light & Power Co.*, Ala., 51 So. 30.

117. Vendor and Purchaser—Burden of Proof.—In an action between adjoining lot owners to recover a strip claimed as a part of plaintiff's lot, held, that the burden was upon defendants to show fraud or mistake in the description in their deed, and that plaintiff had notice thereof on purchasing.—*Beavers v. Baker*, Tex., 124 S. W. 450.

118.—Performance of Contract.—Where defendant contracted with plaintiff to sell him his farm, agreeing to deliver the deed on the payment of the purchase price, the obligation was on plaintiff to pay or tender to defendant the purchase money on the date fixed by the contract, in order to put defendant in default.—*Norris v. Letchworth*, Mo., 124 S. W. 559.

119.—Time for Conveyance.—Though time is not made the essence of a contract for the sale of land, the vendor is bound to convey within a reasonable time.—*Colpe v. Lindblom*, Wash., 106 Pac. 634.

120. Venue—Plea of Privilege.—Defendant cannot, in a plea of privilege, seeking to change the venue, present an issue of fraudulent assignment of the claim in suit, without specially charging that the claim was fraudulently assigned for the purpose of conferring jurisdiction.—*Pearce v. Wallis, Landes & Co.*, Tex., 124 S. W. 496.

121. Water and Water Courses—Obstruction.—Where the obstruction causing land to be overflowed is permanent in character, so that the damages are in gross, and there can be but one recovery, such damages are recoverable by the then owner of the land, and not by a successor in title.—*City of Richmond v. Gentry*, Ky., 124 S. W. 337.

122. Wills—Burden of Proving Testamentary Capacity.—In proceedings for the probate of a will, contested on the ground of testamentary incapacity, petitioner has the burden of proving sanity; but until evidence to the contrary is produced the presumption of sanity sustains the burden of proof.—*Clifford v. Taylor*, Mass., 90 N. E. 862.

123.—Legacy to Executor.—A legacy to an executor in lieu of commissions should be deducted before distribution to the widow, who has waived the provisions of the will.—*In re Fogg's Estate*, Me., 74 Atl. 1133.

124.—Testamentary Capacity.—To constitute testamentary capacity, testator need not know the exact extent and value of his property.—*Friedersdorf v. Lacy*, Ind., 90 N. E. 766.

125. Witnesses—Examination.—A witness who is competent may testify without being specially interrogated.—*Mobile, J. & K. C. R. Co. v. Hawkins*, Ala., 51 So. 37.

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JUSTICE CHARLES E. HUGHES.

We feel compelled by the importance of the event to editorially congratulate President Taft on behalf of the profession for his excellent appointment of a successor to Justice Brewer. Some recent appointments have not always been so popular as this one. Strong, independent, clear-headed and comparatively young, Justice Hughes should add considerable strength to the supreme bench for many years. The appointment, moreover should increase the confidence of the people in the federal judiciary. Justice Hughes is one of the people. They elected him because of his sterling character and for his positive, not merely negative attitude toward all moral questions. He is the people's candidate and, because of that fact alone, the supreme court's prestige and hold upon the people has been materially strengthened.

GRANTING FAVORED CUSTOMERS LESS THAN MAXIMUM WATER RATES.

The Supreme Court of Alabama lately considered the question whether a water company favoring particular customers with less than the legally fixed maximum rate, thereby reduced the charge to all furnished with the same facilities to such lower rate. *State ex rel. Fergusson v. Birmingham Water Co.*, 51 So. 354.

The court, after citing a number of cases, holding that such a company's business is affected with a public use, says: "In this case no complaint is made that relator is discriminated against in respect to facilities in the way of getting a supply of water, but only in respect to the price charged. It would seem that, if the rate granted to favored customers is less than the reasonable rate the company may lawfully demand from all consumers on a basis of equality * * * the consequent discrimination is

enjoyed by those having the favored rate at the expense of the company, and does not impinge upon the rights of consumers generally, for they are receiving all they are entitled to have in any event. The granting of a rate to any considerable number of consumers more favorable to them than the rate fixed for consumers generally, in the absence of peculiar circumstances of justification, would be evidential that the general rate is unreasonably high, which would call for municipal or legislative revision to be enacted in a due observance of constitutional limitations. But we do not see our way clear to a holding that whenever a water company makes a concession to a consumer it thereby fixes a new schedule of rates for all its consumers."

To us it seems, that the court rejects one of the implied commands of a maximum rate ordinance or statute. A public utility is so subject to the public use, by which it is affected, that it should neither have the power nor the temptation to create any difference in favor of its customers, whereby one could, in the field of competition, possibly obtain any advantage over another. The public owes to the public utility it permits to come into existence the duty not to betray it by confiscatory regulation. The public utility owes a duty to each and every constituent of the public, that no one shall derive from the franchise it enjoys any opportunity to take advantage of another.

The Alabama court seems to us to admit the general principles just stated, but it does not apply the latter of them. It says, in effect, that the presumption is, that a favor extended to one member of the public is not to the detriment of those to whom it is denied. This presumption would seem against all experience in the case of a common carrier favoring some shippers and denying less than generally uniform rates to others. We take it, that this is so clear that it would be superfluous for a statute fixing maximum rates to provide that less than those rates might be given to some without their being given to others.

But why should not the same rule obtain as to all public utilities? And, even,

if the rule is not so drastic, should it not at least be true, that the burden is cast upon any public utilities company of showing that a lower rate given to any customer is not the maximum reasonable rate for all of its customers?

As it is too clear for debate that a lower rate to a particular shipper is an abuse of the franchise such a public utility as a common carrier enjoys, we will assume, in view of what the Alabama court says, that illustration ought to be resorted to to show how such a favor affects or may affect legitimate competition in the case of water rates by a municipal water company.

In large cities some manufacturing plants count water as a large item in the expense of converting raw material into a finished product. If one concern can get lower rates than its competitor, it can just as effectually drive the latter out of the field as one merchant enjoying lower freight rates may drive another.

The same principle applies to electricity or gas, or anything supplied by a public utility, which enters into power or maintenance of a business establishment, with the cost figured in the output or the marketing of that output. So the rule should apply to an irrigation company, where all users of water should be placed upon absolute equality for many imaginable reasons, all tending to efficiency and freedom from oppression one way or the other.

The Alabama court seems to us not sufficiently to take into account the units of the public to which public utilities owe a duty. It leaves the nature of that duty too much a speculative quantity. It regards an abuse of this character of franchise too much like the creation of a public nuisance which a private citizen cannot have abated unless he suffers special injury therefrom.

This theory seems to us fallacious in that a nuisance is such because it inflicts something on another that he should not be called upon to suffer. But in the case of a public utility not giving one his proportionate benefit out of that he with others of a community confers, for such consideration, upon the public utility, is presump-

tively, to inflict upon him a wrong, either directly or derivatively.

If the distinction we note is sound, then we think it clear, that all legislation or regulation, prescribing maximum rates, by negative pregnant forbids the granting of any favors whatever to one unit of the public, whereby there arises the possibility of advantage over another. The law of competition is within every judicial cognizance and its preservation is cherished in this land of professedly equal opportunities. One of the great problems of our day is the proper limitation to be placed upon the use of a public franchise. With the firm establishment of the principle that companies enjoying such franchises have the right to earn a fair compensation for their property, all other intemperies should be in favor of those by whom the grant of the franchise is made. There are no presumptions in favor of such a grantee which are against common right, and what is not expressly surrendered is reserved.

NOTES OF IMPORTANT DECISIONS.

COVENANTS—RESTRICTION TO PRIVATE RESIDENCE EXCLUDING FLATS.—The restrictive covenants considered in *Koch v. Gorrufo*, 75 Atl. 767, abounds in considerable detail—so much, indeed, that the principle of *inclusio unius est exclusio alterius* might be claimed to call for a very strict construction. The particular clause considered was not to "use said premises for any other purpose except for a private residence," which was claimed to be violated by erecting a building "designed and constructed for occupation by two families," which character of building it was claimed "is now and has always been known as a two-family house."

It did not seem to be denied that a one-family house could be constructed purely for rental purposes. The suit was brought, too, not by the grantor, but by the owner of another parcel in the restricted district, and some little time after the building had been erected and one floor thereof had been leased to a tenant.

The New Jersey Chancery Court said: "I think it is quite clear that the defendant has violated the covenant contained in her deed. There is a very broad distinction between a private and a flat or apartment house. This

distinction was very clearly made by Chancellor McGill in the case of Skillman v. Smartheurst, 57 N. J. Eq. 1, 45 Atl. 855. There the covenant provided that the premises conveyed should not be used for any other purpose than a private dwelling or private dwellings." The Skillman case concerned a violation, however, by the erection of a flat house with three floors, each for a separate family, or a structure which more nearly approached an apartment house.

Under the rule of construing restrictive covenants very strictly, it seems to us somewhat doubtful whether the principal case was rightly decided. It is true there may be some distinction between a private residence and a residential flat, but there may be also conveyed the idea that a private residence means an owner's place of abode. When you get outside of the thought of home residence, particularly in residential place would seem required, when an owner of real estate in a neighborhood is to be restricted in its use. Just as a neighborhood may be preferred without flats, so also, as we know, it is considered more desirable because of its containing homes, instead of rented abodes. It seems about time the phraseology in restrictions of this kind should have some technical character. There are many sorts of neighborhoods in cities. There are home places, detached residence neighborhoods, flat districts, mixed districts and apartment house districts, and one kind is as nearly characteristic as another.

MASTER AND SERVANT—MASTER'S DUTY AND SERVANT'S ASSUMPTION OF RISK.—Obvious and latent dangers are well discussed in a late case decided by Michigan Supreme Court in the case of Adams v. Grand Rapids Refrigerator Co., 125 N. W. 724.

The facts show that a company engaged in the manufacture of porcelain-lined refrigerators manufactured in connection therewith its own porcelain. This incidental manufacture is described in detail and the ingredients of this enamel given and their fusion accomplished. An explosion resulted from the drawing off of molten matter into a tank containing less than the required amount of water from which explosion injury resulted to plaintiff employee.

The defendant contended that the employee was not entitled to be warned against an explosion resulting from a natural law.

The court said: "The natural law which plaintiff's testimony tended to show would result in the explosion in the present case was one which, while well recognized, might not indicate great imminence of danger except under peculiar con-

ditions, namely, permitting this molten matter to flow into a comparatively small quantity of water. But the consequences of the operation of this natural law under these somewhat unusual conditions were so great as to suggest to any prudent man the necessity of informing one likely to be injuriously affected by a want of knowledge of such a natural law. In the present case, it is extremely improbable that this accident would have occurred had the tank been full or nearly full. It was the contact of the molten matter with a quantity of water less than the usual amount which caused the unusual result, and yet this was something that was liable to happen either by an error of judgment or by accident in any day's operation of the smelter. We think, therefore, it was a question for the jury on the proof as to whether this was a natural law which should have been understood by the defendant and communicated to the plaintiff. See, in addition to the cases cited from our own state, Tissue v. Baltimore, etc., R. R. Co., 112 Pa. 91, 3 Atl. 667, 56 Am. Rep. 310; McGowan v. La Plata Mining Co. (C. C.), 9 Fed. 861; Holland v. Coal, I. & R. Co., 91 Ala. 444, 8 South. 524, 12 L. R. A. 232.

As to the employee's knowledge the court said: "It is contended, however, that the plaintiff had the same means of knowledge that the defendant possessed. We think the cases cited support the view that one employed as a workman is not supposed to possess such scientific knowledge of chemical changes or of such extraordinary results of the action of the forces commonly used in the business as those shown in this case. In Holland v. Coal, I. & R. Co., above cited, it was said: 'The other peril arose from the fact, supported by a tendency of the evidence here, that a "boil" of iron upon being punctured, and having its shell broken, bursts, and throws out molten metal in all directions—"explodes," as some of the witnesses stated as to this one, though this term was said to be inapt and inaccurate by others. Of this peril—the danger of the flying molten iron—resulting from unseen and unappreciated conditions and forces, the inexperienced man would know nothing by the exercise of his senses. It was a state of things which would not address itself to his comprehension, and of which he could only come to a knowledge by being instructed in regard to it.'

The duty of the master in a general way seems nowhere better expressed than in a late New Jersey case, as follows:

"A master must instruct his servant as to dangers of which the master knows or ought to know, and of which the master knows, or

ought to know, the servant has no knowledge. *Ramsey v. Raritan Copper Works*, 74 Atl. 137."

See, also, *Roberts v. Virginia-Carolina Chem. Co.*, (S. C.), §6 S. E. 298.

STATUS OF PREFERRED STOCK-HOLDERS IN BANKRUPTCY PROCEEDINGS.

The status of a preferred stockholder in bankruptcy, or insolvency proceedings, has received scant consideration from the courts. If his designation as a "stockholder" were conclusive, there would be no occasion for a contention that he held any other relationship toward the corporation. But inasmuch as his standing must be determined by facts, not appellations, the question arises, "Is he entitled to recognition in bankruptcy, as a creditor of the bankrupt, though postponed to the other creditors, secured and unsecured?" The inquiry becomes important at an early stage of the proceedings, in determining whether these so-called stockholders may vote for a bankrupt's trustee, since the Bankruptcy Act limits the right of selection to "the creditors of a bankrupt estate."¹

At common law, the preferred stockholder was not even entitled to a preference over common stockholders, so far as capital was concerned.²

Upon a dissolution, he stood on a par with unpreferred shareholders and was postponed to all creditors. The common law was not keen to bestow on him any special privileges, except that he should be paid dividends before the common stock received such. His purchase of preferred stock was not the legal equivalent of a loan of money to the company.³ Nor could he, by any manipulations between himself and his corporation, be advanced from the rank of a stockholder to that of a creditor by a surrender of his stock.⁴

(1) *Bank. Act*, 1908, Sections 1, 44.

(2) *Lloyd v. Penn. Co.*, 72 Atl. 16, 21 L. R. A. (N. S.) 228.

(3) *Grover v. Cavanaugh*, 40 Ind. App. 340, 346, 347.

(4) *Reagan v. First Nat'l. Bank*, 157 Ind. 623, 643, 644.

The preferred stockholder, therefore, comes into bankruptcy without any special legal advantages, aside from those arising out of the statute under which his stock was issued, and the acts of the corporation creating it. He is either a stockholder or a creditor. He cannot be both. The preferences allowed him by statute impliedly exclude all others,⁵ and hence to permit the creation of a hybrid form of shares, possessing the qualities of a debt in addition to those imparted to them by statute, would violate the implied prohibitions of the latter.

The question may frequently be simplified, if not solved, by an appeal to the phraseology of the certificates themselves. If they contain the usual wording of a stock certificate, such as "capital stock," "par value," "shares," etc., it argues cogently that the holder is not a creditor but a stockholder only. Thus, the phrase "net earnings" has been held to negative the idea of a creditor relationship,⁶ the word "dividends" was deemed significant,⁷ and the employment of terms such as "stock," "surplus profits," "transferable only on the books of the company" has been regarded as establishing the status of the stock.⁸ The action of the unpreferred stockholders upon the issuance of the preferred stock (action not necessary for the creation of a debt), and the filing of a certificate with some public officer (also uncalled for, if a debt were anticipated), may throw light upon its character, as well as the withholding of the voting power from the preferred stockholder.⁹

A not unusual provision in certificates of preferred stock is a clause allowing holders who receive dividends out of "surplus profits" or "net earnings." The latter have been defined as "What is left after paying cur-

(5) *Lloyd v. Penn. Elec. Co.*, 72 Atl. 16, 21 L. R. A. (N. S.) 228, 231.

(6) *Warren v. King*, 108 U. S. 389, 398.

(7) *Taft, Tr. v. Hartford Co.*, 8 R. I. 310, 5 Am. St. Rep. 575.

(8) *Miller v. Ratterman*, 47 Oh. St. 141, 24 N. E. 496.

(9) *Miller v. Ratterman*, 47 Oh. St. 141, 157, 24 N. E. 496, 500.

rent expenses *and interest on debt* and everything else which the stockholders, preferred and common, as a body corporate, are liable to pay."¹⁰ If, then, the preferred stockholders are creditors, they would be entitled to at least the legal rate of interest upon their demands; and from the "surplus profits" remaining after paying this interest, and other proper demands of creditors, they would be entitled, by the express terms of their certificates, to an additional percentage. Such a construction would enable the holders to receive a double profit—one by way of interest, and another by way of dividends; a result undesirable and unreasonable.

If the duty to pay dividends (and hence the right to receive them) is made dependent upon the discretion of the directors, the relationship is clearly that of stockholders and not creditors; for the payment of interest on debts does not rest in the discretion of the debtor. Where the certificates impliedly recognize that there might be surplus profits from which, ordinarily, preferred stockholders might expect payment, but that the imperative demands of the business might be such that it would be folly to declare dividends therefrom, instead of appropriating the surplus to the immediate needs of the business, the preferred stockholders could not object that the dividends were not forthcoming, so long as the directors exercised a *bona fide* discretion.¹¹

All of this, however, is inconsistent with the notion that the purchase money was paid to the company as a loan, and that the preferred stockholders were creditors.

Another consideration governing the status of preferred stock, arises from the provision for payment of dividends out of surplus profits. It would be extraordinary if the parties were to make the *principal* payable absolutely as a debt, and yet not extend this unconditional obligation to the *incident*, viz., the interest. If the corporation could not afford to pay the lesser thing, (the in-

terest or dividends), *a fortiori* it could not pay, and would not be likely to obligate itself to pay the larger thing (the principal or face of the certificate) in any and all events. A provision limiting dividends to "surplus profits" or "net earnings," effectually destroys all claim of creditorship as to *them*; for they are not unconditionally payable, but can be looked for only when such profits exist; and the same provision makes it highly probable that the principal was intended by all parties to be payable in the same contingency; viz., if there were surplus profits sufficient to redeem the stock. As one court has put it, "Creditors may resort to the body of their debtors' property for interest as well as principal. But these holders of preferred stock are limited for any income or interest, to the net earnings. There is nothing in the certificate which clothes them with a single attribute of a creditor."¹²

In some instances the certificates secure to the company an option for redemption of the preferred stock within a stated period, by paying a stipulated premium on the face value. Where the certificate itself calls for a rate of income which, together with the premium agreed to be paid upon redemption, is in excess of a lawful rate of interest, the fact may argue an intention to pay the income and premium as a dividend, not as usurious interest on a debt. If the acts of the parties can be given an interpretation consistent with a lawful intent, such will be done. This, under the above circumstances, could only be accomplished by regarding the dividends as "dividends," not "interest," the premium as "premium" and not usury, and the par value as the face value of stock, not the principal of a debt. To use the language of the Supreme Court of Massachusetts, "If the special stock is regarded as a debt due from the corporation to the holders in proportion to the number of shares held by them respectively, the practical effect of the statutes would be to empower manufacturing corporations to borrow money at a rate of interest great-

(10) Warren v. King, 108 U. S. 389, 399.

(11) Field v. Lamson Co., 162 Mass. 388, 27 L. R. A. 136, 150, 151.

(12) Warren v. King, 108 U. S. 389, 399.

er than that allowed to be paid on ordinary contracts."¹³

The circumstances under which stock is issued may preclude the theory of a debt. If, as often occurs, the preferred stock is issued to the holders of common stock in a prior corporation which is being reorganized, but no money passes from the preferred shareholder to the new company, it would negative the idea of a debtor and creditor obligation. On the contrary, the very purpose of the reorganization may have been to begin business free from debt, with many members willing to incur the risk of possible failure in consideration of certain preferred rights in profits, if success should attend the new venture. If the certificates were construed as creating a debt, the object of the rehabilitation of the corporation would be defeated, and instead of commencing business with preferred and common stockholders as participating adventurers in the undertaking the company begins its career with an incubus of debt to drag it down.¹⁴

Public policy is also involved in the question here presented. The rights of common stockholders as well as of creditors, are to be considered in construing the certificates of preferred stock. If creditors, whose claims aggregate a large amount, can accept stock certificates, allow their debts to be called "preferred stock," purport to be "preferred stockholders" only, meanwhile concealing their true character, they may seriously damage honest investors who would be willing to subscribe for or purchase the common stock of a company whose only debts were its bonds secured by mortgage, but who would not touch the stock of a corporation, loaded down by a vast miscellaneous debt. Moreover, *bona fide* unsecured creditors, who would feel no hesitancy in extending credit to a company having ostensibly a respectable amount of stock composed of both common and preferred, would be reluctant to advance money to a concern, a large percentage of whose

"stock" was an enforceable debt against the company. If the so-called creditors were creditors in fact, it would seem to be incumbent upon them to see to it they were such also in name; otherwise their false designation might work serious wrong to innocent parties who were investigating the financial condition of the company, or were buying its common stock on the market.

The fact sometimes relied upon as indicating the certificates are interest-bearing debentures is, that the shares are redeemable at the expiration of a designated period; the holders being entitled at least to the par value and dividends then due and unpaid. Where this is the sole or main basis of argument, it is much weakened by the reflection that so important a preference, if intended by the parties, would scarcely be left to mere implication and argument. The courts, in dealing with the claims of preferred stockholders, are inclined to resolve all reasonable doubts against them, for, as said in a recent case, "When they (the incorporators) have undertaken * * * to set forth the preference to which preferred stock is entitled, we think that they must set forth that preference fully; and that, so far as they fail to express a preference, the preferred stock can have no other rights than the common stock."¹⁵

Thus, where the inquiry related to the payment of dividends rather than to the redemption of the face of the stock, language the most positive has been construed with a qualification. If payment is provided for generally, without restriction to "surplus profits," the courts imply a limitation and refuse to regard the duty to pay dividends as unconditional.¹⁶

The rule is thus laid down: "The agreement of a corporation to pay to preferred stockholders certain annual dividends, is always subject to an implied condition that the payment shall be made only out of net

(13) Allen v. Herrick, 15 Gray, 274.

(14) Lockhart v. Van Alstyne, 31 Mich. 76, 18 Am. Rep. 156.

(15) Lloyd v. Penn. Elec. Co., 72 Atl. 16, 21 L. R. A. (N. S.) 228, 232.

(16) Miller v. Ratterman, 47 Oh. St. 141, 24 N. E. 496; Feld v. Roanoke Investment Co., 123 Mo. 603, 27 S. W. 635.

profits which are legally applicable to the payment of dividends. This is true whether the agreed payments be called dividends or 'interest,' and whether they be guaranteed or simply promised."¹⁷

In New Jersey the same result was reached, but in a different manner. The court had before it a certificate entitling the holder to receive dividends not exceeding a certain rate per annum, before any dividend should be set apart or paid on other stock of the company. It was held that the stock was entitled to a dividend each year at the agreed rate, *even if no profits were made*, but that the holder of the certificate could not compel the payment of his dividend until the corporation had a fund on hand which could properly be regarded as profit.¹⁸

If such be the construction of the certificate when there is an apparently absolute undertaking to pay dividends, by the same token the duty to pay the principal is likewise limited, and the corporation, while literally agreeing to redeem the stock at the time specified, does so with the implied reservation that there shall be a redemption provided there are surplus profits sufficient to justify it.

The decisions go farther and hold that even where there has been an unconditional guaranty of dividends on this class of stock, the same are payable only in the event of surplus profits existing, and that the contract created the relation of stockholder, not creditor.¹⁹

The redemption feature becomes of no significance to prove the creation of a debt, where it applies both to face value and to dividends; the certificate elsewhere providing for payment of the latter out of surplus profits. It would make no difference when the dividends were paid,—at the end of the redemption period or from year to year: they would still be payable out of net

earnings. At the stipulated time, therefore, the shareholder can expect his dividends on redemption, *if there are surplus profits out of which to pay them*. But the parties would scarcely impose this limitation on the payment of dividends and yet make the payment of principal absolute at the date fixed. On the contrary, their intent would be identical as to both face value and dividends; the redemption of the former would be provided for from the same source as that which should pay the dividends, i. e., surplus profits.

But more advanced ground than the above can be taken. *Though the certificates be construed as containing an absolute and unqualified agreement to pay the face value at the end of the redemption period, this does not make creditors out of shareholders.* There is no magic in the provision for unconditional redemption. Thus it was held that preferred stockholders do not become secured creditors, even though a mortgage was issued securing them, and though a resolution of the directors was adopted prior to the issuance of the preferred stocks requiring its redemption after a fixed date, out of the proceeds of certain property, if the latter was not sooner disposed of.²⁰

It has also been decided that certificates issued to one who subscribes to a church, purporting to evidence ownership of capital stock of the church corporation *and to be redeemable on the holder removing from the city wherein the church was located*, and residing elsewhere, are stock certificates;²¹ and where the corporation agreed to apply any funds remaining in its treasury to the redemption of stock upon demand of the holder, it was held that the phrase "any funds remaining in the treasury," could only mean such funds as are not necessary for the usual current and proper business of the company; thus reducing the

(17) *Feld v. Roanoke Investment Co.*, 128 Mo. 663, 27 S. W. 635.

(18) *Elkins v. Camden R. R.*, 36 N. J. Eq. 233.

(19) *Taft Tr. v. Hartford R. R. Co.*, 8 R. I. 5-6, 5 Am. St. Rep. 575; *Field v. Lamson Co.*, 162 Mass. 388, 27 L. R. A. 136, 38 N. E. 1126; *Willington v. R. R. Co.*, 13 Allen, 401.

(20) *Black, Recr. v. Hobart Trust Co.*, 64 N. J. Eq. 418, 58 Atl. 926, 56 Atl. 1131.

(21) *Davis v. Proprietors*, 8 Met. (Mass.) 321.

apparently absolute obligation to a conditional one.²²

Similarly, where the corporation, either in the stock certificate or by a formal collateral agreement, stipulates for the redemption of the stock on a day certain, the stock does not become a debt, or the stockholder a creditor.²³

Some decisions, at first glance in conflict with the above, are easily distinguished from or reconciled with them. Thus where preferred stockholders were held to be creditors it was because they were given a lien upon the property and franchises of the corporation, by authority of statute,²⁴ or because the preferred stock had no right to vote,²⁵ or because the preferred stock was not intended to be a permanent part of the capital, but was subject to redemption.²⁶

Elsewhere, the court laid much stress upon the execution of a mortgage securing the stock as if it were a debt; and the fact that, to construe the certificates as stock, would compel the court to hold them unconstitutionally issued.²⁷

If such stock should be deemed to create the relationship of debtor and creditor, it still would not follow that the holder may prove his claim in bankruptcy or vote for a trustee. If the statute or resolution creating his rights, postpones him to general creditors, then he has no interest in the bankrupt estate until it appears there are assets more than sufficient to pay the general creditors in full. Hence, he should have no voice in the selection of a trustee, so long as the Referee cannot see that the estate will more than pay all provable debts.

(22) Culver v. Reno Real Estate Co., 91 Pa. St. 367, 375.

(23) Allen v. Herrick, 15 Gray, 274; Reagan v. First Nat'l. Bk., 157 Ind. 628, 628.

(24) Heller v. National Bank, 45 L. R. A. 438.

(25) Savannah Co. v. Silverberg, 108 Ga. 281, 33 N. E. 908. But cf. Miller v. Ratterman, 47 Oh. St. 141, 157, 24 N. E. 496, 500.

(26) R. R. Co. v. Jackson, 77 Pa. St. 321.

(27) Burt v. Rattle, 31 Oh. St. 116.

But for an independent reason, he is deprived of a voice in the matter. The Bankruptcy Act allows the proof of debts which are a fixed liability, absolutely owing at the time of the filing of the petition.²⁸

If the claim is unliquidated, it must be liquidated in the manner directed by the court, before it can be proved or allowed.²⁹

In the case of a share of preferred stock, not yet due under terms of absolute payment at a fixed time, the liability is not present, but wholly executory. It amounts to no more than an agreement to do a collateral act, viz., to redeem at a certain date. There would be no promise to pay a definite sum of money, to be satisfied *in futuro*. Nor, it seems, does it make any difference, although the right to recover is founded on a contract or promise, or that the damages are susceptible of accurate computation or that the elements by which to ascertain and fix the amount of such damages are furnished by the contract itself. As held by the Supreme Court of Massachusetts, "Strictly speaking, there was no debt due to the plaintiff from the corporation. There was no promise by them to pay at a future time a fixed sum of money as a present existing indebtedness, but only an agreement to do a certain act, collateral in its nature, at a future day, to be performed by the payment of a sum of money computed according to a fixed and definite standard established by the contract."³⁰

From the above authorities it may well be concluded that a preferred stockholder has no right to prove his stock as a claim in bankruptcy, nor can he participate in the creditors' meetings upon the ground that the bankrupt corporation is his debtor.

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(28) Bankruptcy Act, Sec. 63.

(29) Bankruptcy Act, Sec. 63.

(30) Allen v. Herrick, 15 Gray, 274, 286.

WILLS—COUNSEL FEES IN CONTEST.

DODD v. ANDERSON.

Court of Appeals of New York, Feb. 15, 1910.

When a person named as executor in a putative will offers such will for probate, and is met with a contest, he may cast the burden on those who are to be benefited by the probate, or may assume it himself, and, if he assumes it, any liability which he incurs for expenditures in propounding the will is regarded as his personal obligation till it has been allowed him after his appointment on the judicial settlement of his accounts.

WERNER, J.: One William H. Anderson died in February, 1903, leaving a paper purporting to be his last will and testament, which was executed in conformity to the statutes relating to wills, and in which he named as his executors Daniel Anderson, a son, residing in California, and this plaintiff, a nephew, residing in this state. The plaintiff offered this instrument for probate in the proper surrogate's court. A contest was made by two of the defendant's children. After a trial, which extended over a number of days, the surrogate reserved the matter for decision, and finally denied probate upon the ground that at the time of the execution of the instrument the decedent was the victim of certain insane delusions which incapacitated him from making a will. The plaintiff, in his effort to establish this instrument as the will of the decedent, expended the sum of \$5,272.90 for counsel fees and disbursements. After the surrogate had rendered his decision denying probate to the instrument thus offered, and after the defendant had been appointed as administrator of the estate of decedent, the plaintiff presented to the administrator a claim for the amount thus expended, and the claim was rejected. Then the plaintiff brought this action against the administrator to recover the amount for which the claim had been presented. The defendant demurred to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled at Special Term, and that decision was affirmed by the appellate division. 131 App. Div. 224, 115 N. Y. Supp. 688. The latter court made an order (132 App. Div. 896, 116 N. Y. Supp. 1134) allowing an appeal to this court, and certified for our determination of the question: "Does the complaint herein state a cause of action?"

As the demurrer admits all the facts set forth in the complaint, it must be assumed that the plaintiff, who had no pecuniary interest in the probate of the instrument, acted in good faith upon the assumption that it was a valid will duly executed by a competent testator who had given his executors explicit instructions to offer it for probate; and it must be also assumed that the expenditures for which the plaintiff seeks to recover were reasonable, taking into account the extent of the decedent's estate and the nature of the contest in the surrogate's court. The question certified, when reduced to the concrete terms which cover the issue tendered by the complaint, is whether one who is nominated as an executor in an instrument which, in the court of first instance, is judicially declared to be invalid in a will, can maintain an action at law against the administrator of the decedent to recover the moneys expended in the unsuccessful attempt to procure the probate of the invalid instrument. In the case at bar the surrogate's court decided that the paper propounded for probate by the plaintiff was not a valid will. The decree entered upon that decision stands unreversed. The surrogate's court, proceeding further upon the theory that the decedent died intestate, appointed an administrator of the estate, who duly qualified and entered upon the performance of his duties. The plaintiff, recognizing the validity of the proceedings in the surrogate's court, presented a claim to the administrator for the moneys expended in the unsuccessful effort to prove that the decedent had left a valid will. The administrator rejected the claim. Can the plaintiff now maintain an action at law against the administrator to recover for these expenditures? That is the real question presented by this appeal.

In the quest for direct authority in this court upon the precise issue, the diligence of counsel and our research have proved unfruitful. That the question is not free from difficulty is evident from the very careful and instructive opinion of the learned appellate division, with which we deem it our duty to disagree. It is an ancient legal proverb that "hard cases make bad law." The case at bar aptly illustrates the temptation to overlook or ignore fixed legal principles when they are opposed to persuasive equities. The plaintiff, in the effort to carry out the solemnly expressed wishes of his deceased uncle, decided to accept the office of executor for which he had been named, and not only offered for probate the paper pur-

porting to be a will, but waged an active, prolonged, and expensive contest to establish its validity. All this he did, not for himself, but for others, and in doing it he made large expenditures which will have to be borne by him unless he can be reimbursed out of the estate. While such circumstances quite naturally appeal to the individual sense of justice, they cannot be permitted to influence judicial decision unless they are supported by legal principles.

The theory upon which the complaint has been sustained in the courts below is that a person who is named as executor in a paper purporting to be a will should not be compelled to decide in advance whether he will renounce the trust which has been reposed in him, or accept it at the risk of being charged with the costs and expenses of a contest if the paper is judicially declared to be invalid as a will; that when he acts in good faith and with due diligence his fidelity to duty should not be rewarded with pecuniary loss; that the attempt to probate the will is for the benefit of the estate, being made either upon the express or implied direction of the testator and implying a correlative promise that the estate shall reimburse the executor for all necessary or reasonable expenditures made or obligations incurred in that behalf. The argument is indeed persuasive; but is it sound? That it is not without the support of respectable authority must be conceded. *Taylor v. Minor*, 90 Ky. 544, 14 S. W. 544; *Lassiter v. Travis*, 98 Tenn. 330, 39 S. W. 226; *Phillips v. Phillips*, 81 Ky. 328; *Hazard v. Engs*, 14 R. I. 5; *Woerner's Am. Law of Administration* (2d Ed.), sec. 518; *Henderson v. Simmons*, 33 Ala. 291, 70 Am. Dec. 590. But these authorities are based upon assumptions which we believed to be fundamentally fallacious. They are necessarily predicated upon the theory that one who in good faith offers for probate a paper purporting to be a will acts for the benefit of the estate, and thus becomes legally entitled to reimbursement for his expenditures necessarily or reasonably incurred. That is a theory, however, which is utterly irreconcilable with certain elementary principles which underlie the laws relating to the administration of decedents' estates. Since these principles are established beyond dispute, they may be most succinctly stated in the form of legal aphorisms. (1) There can be no executor where there is no will. (2) Unless a will is admitted to probate, there can be no letters testamentary. (3) Until letters testamentary or of administration are issued upon the estate of a decedent,

there is no legal representative of the estate. (4) Although a person is nominated as executor in a paper purporting to be a will, he is under no legal obligation to accept.

As a will is the only source of an executor's power, and letters testamentary are the only evidence of his authority (*Hartnett v. Wandell*, 60 N. Y. 346, 19 Am. Rep. 194), it must follow that, when the former is never established and the latter are never issued, he who assumes to act as executor is merely a volunteer who has assumed the risk of having his acts repudiated by the courts of competent jurisdiction. It may be admitted that one who is named as executor and desires to qualify rests under a moral obligation to offer the putative will for probate, but it is not an imperative legal duty. That may be done by a devisee, legatee, creditor, or any other person interested in the estate. *Code Civ. Proc.* sec. 2614. When a person who is named as executor in such a paper offers it for probate and is met with a contest, he has before him two alternatives, either of which he may adopt. He may cast the burden of contest upon those who are to be benefited by the probate of the paper, or he may assume the burden himself. If he pursue the latter course, he must be deemed to act with knowledge of the well-established legal rule that even a *de jure* executor cannot bind the estate which he represents by any contract of his own making, and that any liability which he incurs or expenditure which he makes under such a contract is regarded as his personal obligation until it has been allowed to him upon the judicial settlement of his accounts. *Aust'n v. Munroe*, 47 N. Y. 360; *Ferrin v. Myrick*, 41 N. Y. 315; *Matter of Van Slooten v. Dodge*, 145 N. Y. 327; 39 N. E. 950; *Parker v. Day*, 155 N. Y. 383, 49 N. E. 1016; *O'Brien v. Jackson*, 167 N. Y. 31, 60 N. E. 238. If one who is actually an executor under a valid will cannot bind the estate by his executory contracts, we are at a loss to know upon what theory it can be done by one who assumes to act under a paper which is never admitted to probate as a will. When, upon his own responsibility, he joins issue with the contestants of the paper which he offers for probate, he must be deemed to do so with the knowledge that he may be beaten in the contest. This responsibility and risk he may avoid, as we have seen, by transferring the burden of the contest to those who are beneficially interested in procuring probate, or by demanding indemnity from them. His neglect to protect himself by either of these safeguards must

logically result in his personal liability for any pecuniary obligation which he creates. When a contest entered into under such circumstances results adversely to him, he alone is legally answerable to those whom he has employed to fight his battle. This may appear to be a harsh result, but it is inevitable under the law as it stands. Any other rule would be clearly unjust and equally harsh; for it would cast the financial burden of a contest upon those who win it. Under such a system, an heir or distributee might establish his right to the estate only to realize that it had been heavily charged or entirely absorbed by the putative executor's fruitless attempt to establish a will. If we assume that, under the rule charging executors with personal liability upon their contracts made in unsuccessful attempts to procure probate of alleged wills, many persons who are named as executors will decline to serve, it is equally fair to assume that, if the contesting heirs or distributees of estates must purchase success at the cost of paying the lawyers on both sides of the controversy, few will be found who have the courage or the resources to contest illegal wills. When these two opposing rules are measured by the test of reason, it will be seen that, when one who is named as executor is confronted with a contest, he may, without loss to himself, place the responsibility upon those who will be benefited if the paper is admitted to probate as a will. But those who contest the probate stand upon different ground. They cannot avoid the contest without relinquishing that which may rightfully belong to them. We are, therefore, inclined to think that every consideration of expediency, no less than the logic of the settled law relating to the administration of decedents' estates, requires us to hold that one who makes an unsuccessful attempt to procure probate of an alleged will cannot charge the expenditures incurred by him against the estate. This view has been adopted in a number of cases in sister states. *Brown v. Vinyard, Bailey, Eq. (S. C.) 461; Executors of Thaddeus Andrews v. His Administrators, 7 Ohio St. 143; Brown v. Eggleston, 53 Conn. 110, 2 Atl. 321; Koppenhaffer v. Isaacs, 7 Watts (Pa.) 170; Yerke's Appeal, 99 Pa. 401; Royer's Appeal, 13 Pa. 569; Kelly v. Davis, 37 Miss. 76; Moyer v. Swygart, 125 Ill. 262, 17 N. E. 450.*

The question certified to this court should, therefore, be answered in the negative, and

the interlocutory judgment and the order of the Appellate Division reversed, and judgment ordered for the defendant on the demurrer, with costs, with leave to plaintiff to serve an amended complaint within 20 days upon payment of the costs of the demurrer.

Note—Duty of Nominated Executor to Offer Will for Probate and Right to Expenses After Successful Contest.—The rationale of the conclusion in the principal case is, that there being an option to "cast the burden of the contest upon those who are to be benefitted by the probate of the paper, if he (the executor) assumes such burden himself he assumes peril, personally, in incurring expense of the litigation." On its face this position appears to us to be illogical. If the nominated, or apparently nominated, executor has a duty cast upon him he has no alternative. If he has no duty he has no right to cast any burden upon anybody, and he has no right to assume any burden against the desire or interests of claimants for or against a putative will. It may be that he has a *prima facie* right in the absence of objection by all those interested as supposed beneficiaries to proceed, but if they are all *sui juris* and object, of record, to a contest being resisted, he ought not to be allowed to assume the burden of a contest, provided, as the court assumes, their letting the probate go by default excuses the nominated executor. He should not be allowed to litigate merely for an opportunity to earn commissions.

The question then is whether all beneficiaries, being *sui juris*, may by stipulation for non-operation prevent the probate of an alleged will.

Re Will Dardis, 135 Wis. 457, 115 N. W. 332, 23 L. R. A. (N. S.) 783. rules that a probate court cannot refuse probate of a will solely because all those interested in its establishment as a will stipulate that the testator was of unsound mind. The court, *arguendo*, said: "Whether a given script is or not the will of the decedent may affect many other rights and interests which cannot be ascertained in advance of such adjudication. Thus, for example, any will devising real estate takes effect at the death of the testator, and may at the moment of such death, create actual vested rights or liens in judgment creditors of the devisee. * * * * Upon probate of the will there is no opportunity to ascertain whether such rights exist, but the holders of them are parties to the proceeding in the sense that they are bound by the adjudication by virtue of the general publication of notice. Indeed, even more remote rights may exist. General creditors of legatees may have a right to question the *bona-fides* by which such legatees surrender any portion of their property after the right to it becomes vested, and no court in which a litigation to that end might be instituted has any power to pass on the existence and validity of an alleged will. * * * It is for reasons like these that the courts have uniformly held that the proceeding to probate a will is a proceeding *in rem*, binding all the world and in which even public welfare and policy are involved."

In *Cochran v. Zachery, 137 Iowa, 585, 115 N. W. 486, 16 L. R. A. (N. S.) 235*, an agreement

to compensate the executor and trustee under the will in case he defeat the probate by paying him what he would have received as fees, was held void as against public policy as tending to thwart justice and defeat a trust reposed independently of any interest in any beneficiary. This proposition is of course very clear, because it may cut off one not a party to the agreement by one abandoning a trust he is professing to uphold, plainly distinguishable from an agreement among all beneficiaries for a different distribution than that provided for by a will where the interests have already vested. *Re Garcelon*, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134. This latter is but a partition upon valuable considerations. In the Cochran case the nominated executor declined to qualify and agreed with other heirs to join them in a contest, if they would allow him the commissions he would have earned. The note, therefore, was held unenforceable.

The opinion in the principal case, as decided by appellate division of Supreme Court, and reversed above, admits all of the cases cited by the principal case to be opposed to it, but it argued that: "Those decisions were made on the assumption that an executor who defends a suit to set aside a will does so not for the benefit of the estate, but as the agent and for the benefit of those interested in sustaining the will, the devisees and legatees, to whom he must look for payment of expenses; whereas, the executor is the representative of the testator, not of the legatees or devisees: and the question is whether the law will protect him in acting upon the apparent authority with which he justly and in good faith believes he has been clothed," but, as we have seen, this view was reversed.

In *Dowie v. Sutton*, 227 Ill. 183, 81 N. E. 395, it was said: "The estate of Frederick Sutton cannot be drawn on to re-imburse the appellants for their expenditures in the unsuccessful effort to uphold the will. The executor must look to the beneficiaries in whose behalf he has carried on the litigation, for his costs. The appellate court properly disposed of this question under the authorities," and no discussion is gone into or authorities cited. But, on general proposition of law the case of *Leonard v. Burtle*, 226 Ill. 422, 80 N. E. 992, seems opposed to this. Thus it was there said: "The bill in this case was filed upon the ground of undue influence exerted by appellant (the executor) over the testatrix, and also upon the ground of mental incapacity of the testatrix, to make the will. Both of these issues were found against the appellant, and the court was justified, in the exercise of a sound discretion, in awarding costs against appellant individually." If the will contest is between proponent as beneficiary, and contestants as heirs-at-law, it has been held proper to tax the unsuccessful party with costs. *Estate Hendershot*, 134 Iowa, 320, 111 N. W. 696. *A fortiori*, we should think, would be the rule as to counsel fees.

There is a dearth of authority upon the precise question involved, and it would seem that the subject needs statutory regulation. Take for example a refusal of an executor to qualify, because of a threatened contest and possession taken by the public administrator. Should he not offer the will for probate? It would seem clear

he should. If he offered it, should he not be allowed in good faith to defend it against a contest, especially if there are minors or those beyond the jurisdiction, interested in its establishment? He surely is bound to some sort of care and diligence. What is the thing he is bound to do? If by collusion he refrained from offering it he would be bound to whomsoever is injured thereby. If he lost the paper negligently he should be made responsible to any one injured, and if he assumes to act as in a case of intestacy he takes some sort of risk. Certain steps in administration require precedent notice by advertisement. Why should not statute regulate this and the probate court be given the power, in its discretion, to excuse or dispense with probate of papers purporting to be wills? C.

JETSAM AND FLOTSAM.

ABOLISHING LIFE TENURE FOR FEDERAL JUDGES.

We suggested last week the abolition of the life tenure of office for federal judges.

We learn from Washington dispatches that Joint House Resolution No. 80, recently introduced into congress and referred to the house judiciary committee, provides for this change, and also for the election of the federal judges by the people.

This resolution is as follows:

"Section 1. That all district attorneys for the district courts of the United States and all judges for the district courts of the United States shall be elected by the people of the states in which their duties are to be performed, and said judges and district attorneys shall be elected in such manner as the legislatures of the states shall provide by law.

"Sec. 2. That the tenure of office during good behavior is hereby abolished as to all the judges of the United States, both of the Supreme Court and the inferior courts, and the judges of the supreme court of the United States shall hold their offices for the term of twelve years, and the judges of the circuit courts of appeal of the United States shall hold their offices for the term of eight years, and the judges of the district courts of the United States shall hold their offices for the term of six years, and the offices of those judges now on the bench who have served for the length of time prescribed for their several courts, respectively, by this amendment shall be vacated, and of all other judges their office shall expire when they shall have served a period of time dating from the time of their appointment equal to the length of term prescribed by this amendment for their several courts, respectively."

This resolution goes farther than our suggestion, which was limited to the abolition of life tenure.

We are not so certain whether the best results are attained by the election of judges by the people.

But we are certain that the abolition of the life tenure and permitting the senate every eight or ten years to say whether a judge should or should not continue on the bench

would solve many troublesome conditions now often prevailing.

Life tenure is hardly compatible with responsible popular government, and breeds contempt of the people and of the states on the one hand, and a lack of confidence and distrust on the other.

A. H. R.

BOOK REVIEWS.

MUNICIPAL FRANCHISES. VOL. I.

This is not a law book proper though it may be said to be somewhat cognate thereto. Its only citation of authority is the municipal records, in the way of ordinances, etc., by means of which the author constructs a sort of compilation of the "terms and conditions upon which private corporations enjoy special privileges in the streets of American cities." The author is Mr. Delos F. Wilcox, Ph. D., chief of the Bureau of Public Service Commission for the First District of New York. Prior books by this author are "The American City," "The Study of City Government," and "The Government of Great American Cities."

The work is to contain two volumes, of which the second will appear a year hence.

The first three chapters treat of franchises in a somewhat general way. Then, after the next two succeeding chapters, in which the author treats of "Injuries to Individuals and Ways of Preventing Them," and "Temptation to Public Wrongs and Ways of Overcoming Them," the remaining sixteen chapters are special, referring to every sort of use of streets, on the surface, overhead and underground, except transportation, which is reserved for the second volume.

The volume shows comprehensively modern facilities in our day of invention, and the manner in which various cities have attempted to regulate the public service corporation.

It is a useful compilation, revealing the complexity of municipal franchises in the multiplication of facilities for denizens of cities and the danger of injury associated therewith. Rates, competition, monopoly and graft are treated, and the book should conduce to the end of solving the problem of how the public may be fairly treated and its public utilities not dealt unjustly by.

This volume is from the Gervaise Press, Rochester, N. Y., 1910, bound in cloth 8 vo., and contains 730 pages.

STEELE ON AGENCY.

This book is by Prof. Sherman Steele, Lecturer on Agency in St. Louis University School of Law. Its title page defines it to be "A Student's Text on the Law of Principal and Agent," and in the brief preface by the author it is said: "This book has been written with a view to its use as a class-room text; and is addressed therefore, principally to students." The author disclaims any attempt "to reduce a treatment of the law of agency to the simplicity of a primer," but he believes that the rules have been stated, and the principles discussed with sufficient clearness and conciseness to bring them within the grasp of the ordinarily intelligent student of law."

With the purpose in mind the pages of the text is within the compass of 262 pages (exclusive of table of contents, index and table of cases) This of itself denotes somewhat its limitations. As limited, however, the book is well constructed, in logical sequence of treatment, and the propositions laid down are lucidly and comprehensively stated. The style of the author is natural, easy, clear, with his text supported by abundant references to authority. Footnotes frequently show the existence of conflict in decision, and distinctions not suggested in the text. This annotation appears to be of a discriminating kind, but ever mindful as is the text of those to whom the text is addressed.

For the purpose aimed at, the volume seems a good execution of a well formed design.

The book contains 347 pages, is bound in law buckram, and is published by T. H. Flood & Co., Chicago, 1909.

CORPORATION MANUAL, 1910—SIXTEENTH EDITION.

This edition of the Manual is enlarged beyond former editions by reason of many changes in statute law, and by its including all the federal statutes affecting business corporations and the anti-trust laws and the corporation tax law and regulations. Some of the associate editors have annotated some of the sections with citations of state reports of respective jurisdictions. As before, there is embraced a cyclopedia of corporation forms and precedents. All of this work is under the supervision of Mr. John S. Parker, the editor, associate members of the editorial staff, and associate editors in the various states and territories.

It is a most useful book, covering nearly 2,000 pages, bound in law buckram, and from the press of Corporation Manual Company, 34 Nassau street, New York, 1910.

HUMOR OF THE LAW.

"My first case," said an eminent lawyer recently, "involved a young woman whose common sense was about as good as were my chances of success. After a protracted struggle we got a jury which I, in my youthful blindness of hope, considered especially favorable to my cause. I drew my client aside and whispered in a triumphant tone:

"Madam, the jury has been picked."

"She turned her baby-blue eyes full upon me."

"Oh, I'm so glad," she gushed, "because I'm a little superstitious and always did have the fullest confidence in bald-headed men!"—Illustrated Sunday Magazine.

"You say the dog bit you?"

"Yes, your Honor."

"Can you show the scar?"

"No, but I can show the dent. He bit me in me wooden leg."

"The dog is discharged. His chagrin and disappointment must be considered a sufficient punishment. Next case."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. **Acknowledgment**—Conclusiveness.—The certificate of the notary public to an acknowledgment in due form of a mortgage will not be lightly overcome—Currier v. Clark Iowa, 124 N. W. 622.

2. **Adverse Possession**—Interlock of Patents.—If there is an interlock between patents, the junior claimant cannot be considered in possession of the interlock, unless he has actual physical possession in it.—Robinson v. Lowe, W. Va., 66 S. E. 1001.

3. **Alteration of Instruments**—Effect.—The material alteration of a written contract intentionally made by a party entitled to benefit thereunder extinguishes all obligations of the contract in his favor against all persons not consenting to the act under Comp. Laws 1909, sec. 1141.—Farmers' Nat. Bank of Tecumseh v. McCall, Ok., 106 Pac. 866.

4. **Appeal and Error**—Determination of Trial Court.—Where the testimony on an issue not covered by the special verdict is conflicting, the court must, under St. 1898, sec. 2858m, conclusively assume that the trial court determined the issue in favor of the successful party.—Smith v. Reed, Wis., 124 N. W. 489.

5. —Review.—Where the record merely showed that the district court sustained a motion to dismiss an appeal from the county court, there was no final order for review—Stewart v. Raper, Neb., 124 N. W. 472.

6. **Assault and Battery**—What Constitutes.—Pointing a gun at one when within shooting distance held an assault, though the gun is not loaded.—Clark v. State, Ok., 106 Pac. 803.

7. **Assignments for Benefit of Creditors**—Sale of Property.—An insolvent debtor can make a valid sale of his property, if the price is fair and the entire consideration is paid to his creditors existing at the time of the sale.—Lightman Bros. & Goldstein v. Epstein, Ala., 51 So. 164.

8. **Attachment**—Claim by Third Person.—Where an attachment has been levied upon per-

sonal property, a third person interposing a claim cannot move to dismiss the attachment; his remedy being to have the levy dismissed.—Wright, Williams & Wadley v. Brown, Ga., 66 S. E. 1034.

9. —Forthcoming Bond.—Failure of forthcoming bond in attachment to describe the property attached held not to vitiate the bond.—Woodward v. Bingham, Ok., 106 Pac. 843.

10. **Attorney and Client**—Liens.—Where parties conspire to defeat an attorney's compensation, the court in a proper case will allow it to proceed to protect the lien.—Cline Piano Co. v. Sherwood, Wash., 106 Pac. 742.

11. **Bankruptcy**—Actions by Trustee.—A trustee in bankruptcy held not entitled to maintain an action which the bankrupt could not maintain.—Kalamazoo Trust Co. v. Merrill, Mich., 124 N. W. 597.

12. **Banks and Banking**—Control and Regulation.—The Legislature may define as banking a business of a department store in receiving deposits, etc., and subject it to regulations providing for banking business proper.—MacLaren v. State, Wis., 124 N. W. 667.

13. **Bills and Notes**—Action on Note.—Evidence that a note sued on was not transferred until after maturity was admissible.—Smith & Nixon Piano Co. v. Lydick, Minn., 124 N. W. 637.

14. —Negotiability of Note.—A note negotiable on its face does not become non-negotiable because of a stipulation in a mortgage securing it for an attorney's fee upon foreclosure.—Farmers' Nat. Bank of Tecumseh v. McCall, Ok., 106 Pac. 866.

15. —Principal and Surety.—In an action on a note, the burden is on defendant of proving that he was a surety to plaintiffs' knowledge.—Randler v. Bradley, Minn., 124 N. W. 644.

16. **Brokers**—Compensation.—An owner employing a broker to procure a purchaser held not liable for commission to a third person employed by the broker.—Benham v. Ferris, Mich., 124 N. W. 538.

17. **Cancellation of Instruments**—Deeds Executed Without Authority.—Where a deed is executed in the owner's name without authority, mere lapse of time will not bar a suit in equity to cancel the deed.—State v. Warner Valley Stock Co., Or., 106 Pac. 780.

18. **Carriers**—Carriage of Goods.—The act of a carrier in handling goods for some shippers without prepayment of freight and not for others engaged in the same business held not to constitute a violation of Laws 1907, No. 312, sec. 17, providing against unlawful discrimination.—Brown & Brown Coal Co. v. Grand Trunk Ry. Co., Mich., 124 N. W. 528.

19. —Colored Persons.—Any person having an appreciable mixture of negro blood belongs to the colored race, within Acts 1890, p. 152, No. 111, requiring railroad companies to provide separate accommodations for white and colored races.—Lee v. New Orleans Great Northern R. Co., La., 51 So. 182.

20. **Chattel Mortgages**—Lien.—That a chattel mortgage note was not in the possession of the mortgagor at the trial between her and a levying creditor did not defeat the lien of the mortgage.—Peppers v. Harris, Iowa, 124 N. W. 625.

21. —Property Subject.—Any interest in property, whether legal or a mere equity, may be

mortgaged.—*Fountain v. Fountain*, Ga., 66 S. E. 1020.

22.—Validity.—Where mortgaged property levied on did not belong to the judgment debtor, or the levying creditor could not object that the mortgage was invalid.—*Florance v. Wilson*, Col., 106 Pac. 879.

23. Conspiracy—Prosecution and Punishment.—It is not necessary to make conspirators parties defendant, but one alone may be convicted upon proof that there was a conspiracy of which he was a member.—*State v. Smith*, Or., 106 Pac. 797.

24. Constitutional Law—Liberty to Choose Occupation.—Banking is a common-law right pertaining equally to every member of the community, and cannot be prohibited under a constitution which recognizes the right and grants power to the legislature to regulate and supervise it.—*Weed v. Bergh*, Wis., 124 N. W. 663.

25.—Retroactive Statutes.—Though the Legislature may provide new remedies for past wrongs, it cannot create new obligations therefore.—*Quinn v. Chicago, M. & St. P. Ry. Co.*, Wis., 124 N. W. 653.

25 Commerce — Shipment of Liquors.—Protection afforded by the United States Constitution to interstate shipments of liquors held to extend only to persons lawfully in possession of the liquor.—*Gilmore v. State*, Ok., 106 Pac. 801.

27. Compromise and Settlement—Consideration.—Claimant's forbearance to sue on a claim against an estate was a sufficient consideration for an agreement by one in possession of the estate to pay claimant a sum agreed upon in settlement of the claim.—*Bull v. Hepworth*, Mich., 124 N. W. 569.

28. Contract—Acceptance.—Where a party to a contract is to become bound by his acceptance thereof, any change in any of the material stipulations or the bringing in of new stipulations is a rejection of the contract as offered.—*Bridge v. Calhoun, Denny & Ewing, Inc.*, Wash., 106 Pac. 762.

29. Contracts—Extras.—A builder, furnishing work and materials not specified, is entitled to compensation therefor as extra.—*Hedden Const. Co. v. Rossiter Realty Co.*, 121 N. Y. Supp. 64.

30.—Taking Effect.—The fact that a party may have manual possession of contract does not constitute a binding delivery, but the question is still open whether the other party intended to place them in the hands of such party beyond recall.—*Koester v. Northwestern Port Huron Co.*, S. D., 124 N. W. 740.

31. Contribution—Accrual of Right.—One joint obligor may not sue another joint obligor on their common obligation until he has paid the debt, or a larger portion thereof than he would be liable to pay.—*Kalamazoo Trust Co. v. Merrill*, Mich., 124 N. W. 597.

32. Courts—Abuse of Discretion.—Abuse of discretion of a district judge in refusing a writ of prohibition to the county court is no ground for its issuance by the Supreme Court.—*Selzler v. Bagley*, N. D., 124 N. W. 426.

33. Covenants—Words of Grant.—Words of covenant in a deed are as effectual as words of grant.—*In re Barkhausen*, Wis., 124 N. W. 649.

34. Criminal Evidence—Other Offenses.—In a prosecution for conspiracy, when the unlawful agreement ends, evidence of subsequent overt acts or declarations is inadmissible, except

where they relate to a subsisting interest in the property fraudulently acquired by the conspiracy.—*State v. Smith*, Or., 106 Pac. 797.

35. Criminal Law—Assault with Intent to Rape.—In a prosecution for assault with intent to rape, a complaint of the injured female, made three days after the assault, held not admissible as part of the *res gestae*, under Clv. Code, sec. 5179.—*Huey v. State*, Ga., 66 S. E. 1023.

36. Customs and Usages—Effect as Applied to Contracts.—Proof of usage or custom is admissible only as an aid or instrument tending to aid interpretation.—*American Can Co. v. Agricultural Ins. Co. of Watertown*, N. Y., Cal., 106 Pac. 720.

37. Creditors' Suit—Scope of Remedy.—A judgment in attachment, based solely on a levy on real estate, cannot be made the basis of a suit to determine whether the debtor owned the land.—*Bliss v. Tyler*, Mich., 124 N. W. 560.

38. Criminal Law—Offenses Against Liquor Law.—In a prosecution for furnishing intoxicating liquor to a certain person, held that, to show the knowledge and intent of accused, and to rebut the presumption of accident or mistake, testimony as to furnishing liquor to others was admissible.—*People v. Giddings*, Mich., 124 N. W. 546.

39. Customs and Usages—Exclusion by Contract.—Where a contract, clear and explicit, granted a party the right to sell pianos, but was silent as to the subject of exchange, it cannot be enlarged by proof of a custom on the part of piano dealers to exchange pianos.—*Starr Piano Co. v. Morrison*, Mich., 124 N. W. 562.

40. Death—Rights of Action.—Though the right of action for wrongful death arising in favor of surviving relatives comes into existence when death occurs, it has an inchoate existence as soon as the negligent act produces the injury.—*Quinn v. Chicago, M. & St. P. Ry. Co.*, Wis., 124 N. W. 653.

41. Deeds—Blank Deed.—A deed delivered in blank as to the grantee held to vest title in any person whose name should thereafter be inserted by the person receiving it, or any subsequent holder.—*Augustine v. Schmitz*, Iowa, 124 N. W. 607.

42. Divorce—Appeal.—Where a decree was entered for plaintiff, but defendant was awarded counsel fees and suit money, which she retained, she was estopped from appealing from the whole decree.—*Tuttle v. Tuttle*, N. D., 124 N. W. 429.

43. Ejectment—Burden of Proof.—Where plaintiff claims the land through title acquired by his grantor after execution of the deed to him, the burden of proving that the grantor was an alien and could not hold the land was upon defendant.—*Gough v. Center*, Wash., 106 Pac. 774.

44. Eminent Domain—Condemnation Proceedings.—The complete title of a city under condemnation proceedings, judgment to which awarded the fee simple to the city, cannot be collaterally questioned.—*Reichling v. Covington Lumber Co.*, Wash., 106 Pac. 777.

45.—Injury to Property.—Under Const. 1901, sec. 235 (Const. 1875, art 15, sec. 7), the owner of abutting property held to have a right of action against the city for damaging his property by the removal of shade trees in improving the street, if the value of his property was affected thereby.—*McEachin v. City of Tuscaloosa*, Ala., 51 So. 153.

46. Equity—General Prayer.—Fact that a bill prayed specifically for reformation, and not for rescission of a contract, held not to preclude complainant from a rescission, where there was a prayer for general relief.—*Grand Trunk Ry. of Canada v. Wolcott*, Mich., 124 N. W. 530.

47. Estoppel—Assumption of Mortgage Debt.—Where the evidence does not show that a grantee in a deed accepted it with knowledge of a clause therein under which he assumed the mortgage on the property, he is not estopped from denying liability.—*Demaris v. Rodgers*, Minn., 124 N. W. 457.

48.—Pleading.—It is a sufficient pleading of an equitable estoppel to allege the facts constituting it, without in so many words alleging the conclusion that they constituted such estoppel.—*City of Spokane v. Costello*, Wash., 106 Pac. 764.

49. Evidence—Declarations of Agent.—Declarations by an agent are admissible against the principal only when forming a part of the res gestae.—*Caldwell v. Nelson Morris & Co.*, La., 51 So. 205.

50.—Foreign Laws.—Where the fact as to a foreign law is properly alleged, the presumption that the law is the same as that of the forum must be applied, in the absence of proof to the contrary.—*Lilly-Brackett v. Sonnemann*, Cal., 106 Pac. 715.

51.—Opinions.—Where plaintiff testified to being injured by the lurching of the train, and stated that he did not know the cause thereof, it was not error to exclude questions on cross-examination which could only elicit his opinion as to the cause.—*Louisville & N. R. Co. v. Willis*, Fla., 51 So. 134.

52. Exchange of Property—Rescission.—Misrepresentations to induce complainants to incorporate their business and exchange its stock for stock in defendant corporation held to constitute such deceit as entitled complainants to a rescission.—*Allen v. Fulper*, Mich., 124 N. W. 525.

53. Execution—Release of Property Levied Upon.—Where an officer levies an execution on goods, some of which are subject to execution and some not, it is his duty to separate them, if possible.—*McCausey v. Hock*, Mich., 124 N. W. 570.

54. Executors and Administrators—Compromise Without Administration.—One rightfully in possession of the entire estate of a decedent can in good faith, to avoid the expenses of administration and possible litigation, compromise a claim against the estate.—*Bull v. Hepworth*, Mich., 124 N. W. 569.

55.—Payment of Debts.—The executor or administrator takes possession of all the estate of a decedent for the purpose of administration, and all his property is subject to his debts with no priority between the personal and real property in its application to this purpose.—*Richards v. Blaisdell*, Cal., 106 Pac. 732.

56.—Sale of Land.—County courts in ordering the sale of realty to pay a decedent's debts are courts of general jurisdiction, so that their orders, in such proceedings, can only be collaterally impeached where want of jurisdiction affirmatively appears upon the face of the record.—*Smith v. Whiting*, Or., 106 Pac. 791.

57. Fire Insurance—Knowledge of Agent.—Where an agent is personally interested in the

property insured, no policy issued by him thereon, or act done by him in connection therewith, binds the insurer unless it knew and assented to it.—*Dull v. Royal Ins. Co.*, Mich., 124 N. W. 533.

58. Fines—Enforcement of Sentence.—A subsequent sentence to hard labor for failure to pay a fine previously imposed held without authority.—*Lacey v. Hendricks*, Ala., 51 So. 157.

59. Food—Municipal Ordinances.—A municipality, under its general welfare clause, may by ordinances regulate, in the interest of public health, the sale of milk and milk products.—*Rigbers v. City of Atlanta*, Ga., 66 S. E. 991.

60. Frauds, Statute of—Modification.—Parties to a written contract within the statute of frauds cannot by parol show a subsequent oral agreement modifying the same.—*Bonicamp v. Starbuck*, Ok., 106 Pac. 839.

61. Gambling—Municipal Ordinance.—A municipal ordinance making it an offense to gamble at cards held not invalid because not defining gambling.—*City of Lake Charles v. Marcantel*, La., 51 So. 106.

62. Garnishment—Answer.—Under a statute directing that the garnishee shall answer by affidavit plaintiff has a right to demand answer under oath, but, if he does not require it, an untrifled answer is sufficient.—*Brooks v. Fields*, Ok., 106 Pac. 828.

63. Gifts—Inter Vivos.—A parol agreement between sisters that the survivor shall own certain property held not a gift inter vivos from the sister owning it to the one in possession.—*Marshall v. Stratton*, Miss., 51 So. 132.

64. Guaranty—Original Undertaking.—A note addressed to a person, directing him to ship certain goods to a third party, and stating that "your money is good," held an original undertaking to pay for the goods shipped on the faith of such order.—*Goldring v. Thompson*, Fla., 51 So. 6.

65. Guardian and Ward—Continuance of Relation.—For the purposes of settlement a guardianship is deemed to continue after it has in law ceased.—*Mitchell v. Penny*, W. Va., 66 S. E. 1003.

66. Indictment and Information—Assault with Intent to Kill.—Under an indictment for assault with intent to murder, a verdict finding defendant guilty of shooting at another may be lawfully rendered.—*Rhinehart v. State*, Ga., 66 S. E. 892.

67. Injunction—Restraining Breach of Contract.—Where the complaint shows a cause of action for restraining breach of contract, it is no defense that the injunction would amount to an attempt to compel defendant to perform personal services.—*Butterick Pub. Co. v. Rose*, Wis., 124 N. W. 647.

68. Intoxicating Liquors—Local Option.—The threatened refusal of municipal authorities to grant a liquor dealer a renewal of his license held not to entitle him to maintain an action attacking the validity of the election.—*Oligny v. City of New Richmond*, Wis., 124 N. W. 652.

69. Judgment—Amendment.—Records, minutes, or memoranda of the court held competent upon motion to amend judgment.—*Edmunds v. Inman*, S. D., 124 N. W. 430.

70.—Estoppel.—A vendee suing for specific performance, having pleaded the execution of the contract by the vendor, and tried the case

on that theory, cannot recover upon the theory that the vendor was estopped to deny its execution.—*Fritz v. Mills*, Cal., 106 Pac. 725.

71. **Justice of the Peace.**—Disqualification of Surety.—A surety on a bond for an attachment in a justice court, being affected by a judgment against his principal, cannot become surety on a bond upon appeal therefrom.—*Hines v. International Harvester Co. of America*, Ga., 66 S. E. 989.

72.—Liability for Official Acts.—An action cannot be maintained against a justice of the peace for acts judicially performed.—*Lacey v. Hendricks*, Ala., 51 So. 157.

73. **Landlord and Tenant—Croppers.**—A cropper cannot create a lien on the crop in favor of a third person by purchasing supplies which his landlord has refused to furnish him.—*Fountain v. Fountain*, Ga., 66 S. E. 1020.

74.—Tenancy After Expiration of Term.—Where the lessor notifies the lessee before a new tenancy that the terms of the original tenancy will be changed in a specified respect, and the tenant assents to the change, the terms of the original lease are applicable, except as to such change.—*Woods v. Bank of Haywards*, Cal., 106 Pac. 730.

75. **Larceny—Property Taken.**—An indictment for larceny of mortgaged personality after condition broken may properly lay the ownership in the mortgagor.—*State v. Stokes*, S. C., 66 S. E. 993.

76. **Libel and Slander—Privileged Communications.**—In a prosecution for criminal libel, the burden is on prosecutor to show that the alleged libel was both false and malicious.—*Graham v. State*, Ga., 66 S. E. 1038.

77.—Qualified Privilege.—Accusation made by one member of a fraternal benevolent order against another held one of qualified privilege.—*Graham v. State*, Ga., 66 S. E. 1038.

78.—Report of Private Investigation.—Mere private investigations by officers or public authorities held to confer no more right upon a newspaper publisher to comment thereon than upon a private individual.—*Williams v. Black*, S. D., 124 N. W. 728.

79. **Life Insurance—Application.**—Incomplete answer to question in application for life insurance held not to vitiate the policy.—*O'Connor v. Modern Woodmen of America*, Minn., 124 N. W. 454.

80. **Limitation of Actions—Nature of Plea.**—A plea of the statutes of limitations is an answer to the merits.—*Lilly-Brackett Co. v. Sonnemann*, Cal., 106 Pac. 715.

81. **Lis Pendens—Ejectment.**—A purchaser from one adjudged to have title in ejectment holds subject to the rights of the party filing the lis pendens from the filing to the determination of the second trial in ejectment.—*Voight v. Wolf*, Minn., 124 N. W. 446.

82. **Mandamus—Right to Writ.**—If an order is a final order so as to be reviewable on appeal, mandamus will not lie to set it aside.—*Price v. Perkins*, Mich., 124 N. W. 525.

83.—Right to Writ.—While the court may deny mandamus where there has been any delay in applying for it, irrespective of the statutes of limitations, if it is apparent that the delay has not prejudiced the rights of the adverse party, and the relief sought does not depend upon doubtful and disputed questions of fact, the writ

may issue.—*State v. Edwards*, Mont., 106 Pac. 703.

84.—Transfer of Stock.—Mandamus will lie to compel a corporation to recognize the holder and owner of an outstanding certificate of stock acquired in good faith for value as the owner of the stock.—*State ex. rel. Louisiana State Bank v. Bank of Baton Rouge*, La., 51 So. 95.

85. **Master and Servant—Assumed Risk.**—Where a servant, with knowledge of the dangers arising from defects in a machine he is operating, continues in the service in consideration of an increase of his wages, he assumes the risk resulting from the defects.—*Southern Cotton Oil Co. v. Walker*, Ala., 51 So. 169.

86.—Assumption of Risk.—Assumption of risk is an affirmative defense, and the burden is on the master to plead and prove it.—*Duffey v. Consolidated Block Coal Co.*, Iowa, 124 N. W. 609.

87.—Assumption of Risk.—A servant need not familiarize himself with all the machinery or appliances which he does not use himself, and he may presume that his safety has been reasonably provided for, and in general he may use an appliance without first particularly inspecting it.—*Kaukola v. Oliver Iron Mining Co.*, Mich., 124 N. W. 591.

88.—Vice Principal.—Where a master clothes an employee with authority to control another servant, the superior servant is a vice principal to the servant under his control.—*Benak v. Paxton & Vierling Iron Works*, Neb., 124 N. W. 461.

89.—Volunteers.—A volunteer, crossing a railroad company's yard in front of a rapidly approaching train, held guilty of negligence, unless the injury was caused by the railroad company's willful and wanton act.—*Central of Georgia Ry. Co. v. Mullins*, Ga., 66 S. E. 1028.

90. **Mines and Minerals—Oil and Gas Lease.**—An oil and gas lease held to be an executory contract vesting no title in the lessee to the oil and gas in place.—*Smith v. Root*, W. Va., 66 S. E. 1005.

91. **Money Received—Statute of Frauds.**—In an action for money received, it was not material that the contract under which defendant was unjustly enriched was unenforceable under the statute of frauds.—*Todd v. Bettingen*, Minn., 124 N. W. 443.

92. **Mortgages—Assumption of Debt by Mortgagee.**—Clause in a deed by which grantee assumes a mortgage, inserted therein by fraud of the grantor, is not binding on the grantee.—*Demaris v. Rodgers*, Minn., 124 N. W. 457.

93. **Municipal Corporations—Appointment to Fill Vacancy.**—An appointment on the death of an officer, after his election to a second term and before the expiration of the first term, to fill the vacancy, is only for the balance of the first term, and not for the second term, to which the deceased officer was elected.—*People v. Stockwell*, 121 N. Y. Supp. 6.

94.—**Governmental Duties.**—A municipal corporation is not liable for negligence of employees in the performance of a governmental duty.—*City and County of Denver v. Maurer*, Colo., 106 Pac. 875.

95.—**Grading Street.**—Where a city lowered the grade of a street, destroying three driveways leading to an abutting owner's property, and rendering flights of steps unserviceable, the city was bound to replace the drive-

ways and the steps.—*Landry v. City of Lake Charles, La.*, 51 So. 120.

96.—**Use and Regulation of Public Places.**—At common law the owner of land abutting upon a public street was not entitled to consequential damages for injury from a lawful change in the grade of the street.—*People v. Stillings*, 121 N. Y. Supp. 13.

97. **Negligence.**—Questions for Court.—It is only when all reasonable men must draw the same conclusion that the question of negligence is for the court.—*St. Louis & S. F. R. Co. v. Loftis*, Ok., 106 Pac. 824.

98. **New Trial.**—New Defense After Verdict.—Where new matter of independent defense arises after verdict, held, that the remedy is not by motion for a new trial.—*Bandler v. Bradley*, Minn., 124 N. W. 644.

99. **Officers.**—Failure to Give Bond.—The failure of one duly appointed to a public office to give the required bond held not to prevent him from being a *de jure* officer holding by defeasible title.—*State v. Carroll*, Wash., 106 Pac. 748.

100. **Partition.**—Distribution of Proceeds.—The widow's distributive share, upon the partition and sale of the estate, should not be charged with any part of the general costs of administration, but only with its proportionate part of the expense of partition.—*Swift v. Flynn*, Iowa, 124 N. W. 626.

101. **Sale of Property.**—The administrator could not, upon the partition and sale of a decedent's realty, pay any debts of the estate out of the proceeds, and charge any part thereof to the distributive share of the widow.—*Swift v. Flynn*, Iowa, 124 N. W. 626.

102. **Pleading.**—Motion to Strike.—Where a plea contains three separate defenses, one of which is good, plaintiff's remedy is by motion to strike.—*Western Union Telegraph Co. v. Saunders*, Ala., 51 So. 176.

103. **Principal and Agent.**—Creation of Relation.—Where one refers another to a third person for information as to a matter under dispute, he thereby makes such person his agent in regard to such matter, and is bound by the declarations of such third person.—*Armstrong, Byrd & Co. v. Crump*, Ok., 106 Pac. 855.

104. **Implied Promise.**—Where an agent purchases property at the request and for the account of his principal, without any definite promise on the part of the principal to reimburse his agent, the law will imply and enforce such promise.—*Joseph v. Sulzberger*, 121 N. Y. Supp. 73.

105. **Right of Agent.**—An agent cannot be at the same time a party and the agent of the opposite party unless the latter knows of it and assents to it.—*Dull v. Royal Ins. Co.*, Mich., 124 N. W. 533.

106. **Principal and Surety.**—Extension of Time for Payment of Note.—In an action on a note, the burden of proving that plaintiffs extended the note without the surety's consent was on the surety.—*Bandler v. Bradley*, Minn., 124 N. W. 644.

107. **Process.**—Return of Summons.—The return of a summons that it was served by leaving at defendant's "last place of residence," etc., is defective.—*McLanahan v. Chamberlain*, Neb., 124 N. W. 684.

108. **Removal of Causes.**—Proceedings.—Where petition to remove was denied and the party desiring the removal filed a transcript of the record in the United States Court and a motion to remand was denied the state court should

withhold further jurisdiction.—*Bolen-Darnell Coal Co. v. Kirk*, Ok., 106 Pac. 813.

109. **Sales.**—Action for Price.—In an action for the price of lumber, defendant cannot show under the general issue a breach of contract with a third person.—*Goldstein v. Lathrop-Hatten Lumber Co.*, Ala., 51 So. 150.

110. **Breach of Contract by Seller.**—Where a seller repudiates the contract of sale and signifies his intention not to transfer the chattels, the buyer may immediately sue for damages.—*Curtis v. Parks*, Wash., 106 Pac. 749.

111. **False Representations.**—A buyer of a horse, who in an action for the price sets up the affirmative defense of false representations by the seller, held to have the burden of proving that he relied on the representations in making the purchase.—*Smith v. Reed*, Wis., 124 N. W. 489.

112. **Requisites.**—Damages cannot be recovered for the breach of an executory contract for the sale of goods, which specifies no price.—*Lambert v. Hays*, 121 N. Y. Supp. 80.

113. **Set-off and Counterclaim.**—Action at Law.—An individual defendant in an action in a city court cannot set up an equitable set-off as a defense held by a firm of which the defendant was a partner.—*Cole v. Illinois Sewing Mach. Co.*, Ga., 66 S. E. 979.

114. **Specific Performance.**—Pleadings.—In an action for specific performance of a contract to convey land, plaintiff must allege that the consideration to be paid is adequate, or that the contract is as to defendant just and reasonable.—*Fritz v. Mills*, Cal., 106 Pac. 725.

115. **Trespass.**—Damages.—Where one by trespass renders it impossible to conduct a going business, he is liable for damages.—*McCausey v. Hoek*, Mich., 124 N. W. 570.

116. **Trial.**—Affidavits of Jurors.—Affidavits of jurors are not in general admissible to impeach their verdict.—*Washington Luna Park Co. v. Goodrich*, Va., 66 S. E. 977.

117. **Misleading Instructions.**—A misleading charge is not reversible error, if it could have been cured by an explanatory charge which was not requested.—*Tennessee Coal, Iron & R. Co. v. Williamson*, Ala., 51 So. 144.

118. **Trusts.**—Creation.—To create a parol trust where the donor retains the property, the acts and words relied on must be unequivocal.—*Mitchell v. Bilderbäck*, Mich., 124 N. W. 557.

119. **Resulting Trusts.**—A trust results in favor of one who pays a part of the purchase money of land, on the understanding that he would have a corresponding interest therein.—*Carlson v. Erickson*, Ala., 51 So. 175.

120. **Usury.**—Burden of Proof.—The burden of proving usury is upon him who pleads it.—*Fulwood v. Leitch*, Ga., 66 S. E. 987.

121. **Partial Illegality.**—Where a contract was partially illegal, as constituting an agreement to pay usury, and not severable, it was wholly unenforceable.—*Inland Trading Co. v. Edgecomb*, Wash., 106 Pac. 768.

122. **Vendor and Purchaser.**—Bona Fide Purchaser.—If a person purchasing land acquires knowledge before payment of the consideration that another has a contract for purchase of it, he is not a bona fide purchaser.—*Barney v. Chamberlain*, Neb., 124 N. W. 482.

123. **Time as the Essence of Contract.**—Where time was not of the essence of a contract, the vendor could not put the vendee in default without tendering a deed and demanding payment.—*Davis v. Wilson*, Or., 106 Pac. 795.

124. **Waters and Water Courses.**—Contract to Supply Water.—In an action against a water company for breach of a contract to supply water to plaintiff by shutting off the supply for 30 hours, the inconvenience in obtaining water was within the contemplation of the parties as a probable result of the breach, and an item of recoverable damages.—*Birmingham Waterworks Co. v. Ferguson*, Ala., 51 So. 150.

125. **Wills.**—Parol Wills.—A parol agreement by two sisters that the survivor should have certain personalty held merely a futile effort to make a parol will.—*Marshall v. Stratton*, Miss., 51 So. 132.

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OCCUPATION TAX ON C. O. D. LIQUOR SHIPMENTS.

In Texas a statute imposes "an occupation tax or license on persons, firms or corporations handling intoxicating liquors C. O. D." Its validity was challenged in a suit to recover from an express company what plaintiff had paid it on liquor shipped C. O. D. from Dallas, Tex., to consignees of liquors in various parts of the state for outgoing and return express charges. *L. Craddock & Co. v. Wells-Fargo Express Company*, 125 S. W. 59.

On the day the liquor was shipped from Dallas the statute imposing such tax was enacted, an emergency clause carrying it into immediate effect. The express company refused to deliver all packages except those on which defendant would release the C. O. D., and by direction of plaintiff, redelivered same to him at Dallas, enforcing its lien for carriage before turning same back to plaintiff.

Passing the question of the statute making the carrying out of its contract to deliver the goods unlawful, we call attention to what the court says about the contention that the statute is invalid, because of unreasonable classification under the Texas constitution.

It was claimed that this was "not a tax on the express business nor upon intoxicating liquors, but is a tax only on the C. O. D. feature of the carriage of intoxicating liquors, which is merely an incident to the business." Says the court: "We do not agree to this contention. The law imposes an occupation tax on persons, firms or corporations handling intoxicating liquors C. O. D.

The tax is imposed on the delivering of liquors and collecting from the consignee the price of the same and returning it to the consignor. This is not a necessary part of the business of express companies. In our opinion it constitutes a business in itself, and is not, as appellant contends, simply an incident to the express business, which business paid an occupation tax when the statute of 1907 was adopted." The court then goes on to say that independently of that question the statute was valid under the state's police power, the court taking notice of the fact that local option was being habitually frustrated by jug shipments C. O. D. from points outside of local option territory.

We think few will doubt, that the statute is valid to the extent it was being enforced, whether the employment of the term C. O. D. serves to confine it to carriers or not—but possibly its validity could only be saved as an enactment under the state's police power. Would, however, it be held valid as respects the handling of C. O. D. liquor shipments sent from without the states?

The Adams Express Company cases against Kentucky (206 U. S. 129; 214 id. 218) appear to dispose of all claim of validity under the police power in a decidedly adverse way. The former of these two cases held invalid a statute making it an offense to deliver any C. O. D. shipment of liquor on the ground that it "is obviously an attempt to regulate interstate commerce." The second case was under a statute making it an offense to furnish, sell etc., liquor to any person who is an inebriate. The opinion in the latter case was very brief and based itself on the ruling in the former case.

But here is a new kind of question, and an opinion delivered by Justice Harlan on April 4th, 1910, in *Southwestern Oil Co. v. Texas*, not yet reported, may be thought to have some bearing thereon.

In the Oil Company case it was claimed that an occupation tax was void under the Fourteenth Amendment in making an arbitrary classification. The supreme court of the state was affirmed in upholding the tax and, in the opinion by Mr. Justice Harlan, the relation of such impositions to the Fourteenth Amendment was treated quite fully. Among other things, he said: "It was never contemplated, when the Amendment was adopted, to restrain or cripple the taxing power of the states, whatever the methods they devised for the purposes of taxation, unless those methods, by their necessary operation, were inconsistent with the fundamental principles embraced by the requirements of due process of law and the equal protection of the laws with respect to the rights of property." Therefore, it might be thought, that such a classification as is here attempted to be made would, if there is any fair reason therefor, be upheld, so far as the Fourteenth Amendment is concerned. It would be allowed, if a C. O. D. shipment or rather the additional duties involved therein constitute a transaction having no necessary relation to transportation.

It is undoubtedly true that states may do many things which affect interstate commerce, in an incidental way, which, not being covered by congressional enactment, are valid. It is unnecessary to attempt to enumerate these things, and no enumeration could be considered exhaustive.

If, as the Texas court says, the handling of C. O. D. shipments "constitutes a business in itself," it would seem that, at least until congress prescribed directly with regard thereto, the state could regulate the same and impose a tax thereon. We might also surmise, that if it is "a business in itself" only having a casual connection with interstate commerce, regulation might even be beyond congressional power.

But, even if it is an incidental thing connected with interstate commerce, a state would seem to have the right to regulate, and therefore to tax it, in the absence of action by congress directly affecting such an incident.

NOTES OF IMPORTANT DECISIONS.

EQUITABLE CONVERSION — DIRECTION BY WILL TO SELL AND DISTRIBUTE PROCEEDS OF LAND.—In the case of *West Virginia Pulp Paper Co. v. Miller*, 176 Fed. 284, decided by Fourth Circuit Court of Appeals, the contention was made that a legacy of the proceeds of the sale of land to a religious corporation was void, because of a limitation in the law of West Virginia as to amount of land which could be held by such a corporation. It was said that though the corporation beneficiary was a foreign corporation, such law was as valid against it as against a domestic corporation, on the principle that it can enforce its policy as to land within the territorial operation of the law.

But it was claimed that by the terms of the will there was worked out a conversion which changed the land into money and made this a gift of personality.

It is certain that the doctrine of equitable conversion has been recognized in several of the states and a noted case (relied on by the opinion) in the federal Supreme Court, is that of *Craig v. Leslie*, 3 Wheat. 563. In this case it operated to the benefit of an alien, whose incapacity to take and hold beneficially a legal or equitable estate in real, but not personal, property was conceded.

No direct adjudication by West Virginia on the subject was instanced, but it was argued that "the evil sought to be remedied by the legislature of West Virginia was to prevent the holding of real estate in excess of the amount prescribed by law within its borders by a religious denomination. This is the only extent to which it could possibly go."

This last sentence we have our doubts about, especially when said in reference to wills, and we know there are statutes which limit the amount that can be desired or bequeathed by wills to charity. It is also perfectly familiar, that states can control the disposition of property by testator at his domicil.

We also would greatly doubt whether a devise to a trustee to sell and distribute proceeds of land would not be looked upon as a plain attempt to evade a statute, in any state where the doctrine of equitable conversion is not firmly established. Mere legal title in a naked trustee counts very little in American jurisprudence. Where an alien is cut out by a public policy creating his incapacity, it will scarcely be presumed that the courts where that policy obtains would be alert to assist him in not being debarred thereby by any cir-

cumlocution. As to a religious corporation construction might incline more to leniency.

Also, we may add that even where the equitable conversion is recognized, there exists strictness of application here and liberality there. The ordinary rule is that the direction to sell must be explicit and positive, but it has been held that a devise in trust with sale to be made upon request by a religious corporation with proceeds to establish an orphan asylum was held to be a bequest of money, though the asylum was to be under the control and direction of the corporation. *Germain v. Baltes*, 113 Ill. 33. So a devise of lands ordering, directing and authorizing executors to grant, bargain or lease the same, and dispose of proceeds effected a conversion of land into money. *Forsyth v. Forsyth*, 40 N. J. Eq. 400, 19 Atl. 119. As seemingly against this liberal application, see *In re Bingham*, 127 N. Y. 296, 27 N. E. 1035; *Hudson v. Fuller*, (Tenn. Ct. App.), 35 S. W. 575.

INSURANCE—CLAUSE PRORATING LOSS AMONG SEVERAL POLICIES AS CREATING SEPARATE CONTRACTS BY EACH.—The facts in the case of *Scruggs & Echols v. American Cent. Ins. Co.*, 176 Fed. 224, decided by Fifth Circuit Court of Appeals show it was sought to enjoin a separate suit to collect from one of several insurance companies its proportionate part upon a loss under a clause that "this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by insolvent in insolvent insurers, covering such property."

The court held that clause in each policy did not make the contracts "interdependent," but each was a "separate and independent" contract. Speaking as to the complaint in a suit to enjoin the action at law, the court said: "The complainant's liability would not be affected if all three of the other policies should turn out to be void; nor would it be affected by one or all of the three defendant companies becoming insolvent." Further it was said the result of suits against the other companies would be immaterial to it.

The further contention that equity would interpose because thereby a multiplicity of suits would be avoided, was not deemed tenable as complainant was only liable to one suit, and it was no concern of it whether the other companies were sued or not. Likewise that juries in other suits might place a different valuation on the loss was immaterial.

The insurer seems to have attempted with

success to cut itself completely loose in its contracted obligation, and having succeeded it complains because all of the companies are not allowed to join their forces and pro rate the cost of fighting the insured.

These same questions were passed upon by the Eighth Circuit Court of Appeals in *Mechanics Ins. Co. v. Distilling Co.* 173 Fed. 888, and *Hanover Fire Ins. Co. v. Brown*, 77 Mo. 64, 25 Atl. 959, 39 Am. St. Rep. 386, where the ruling was the same. As contra on the ground of multiplicity of suits see *Home Ins. Co. v. Chemical Co.*, 113 Fed. 1, 51 C. C. A. 21. See, a'so, *Tisdale v. Ins. Co.*, 84 Miss. 709, 36 So. 568.

JURISDICTION—MOTION TO REMAND BY SUMMARY DISMISSAL OF CAUSE ALLEGED TO HAVE BEEN INSTITUTED IN CONTEMPT OF FEDERAL COURT.—The decision in the case of *Cornue v. Ingersoll*, 176 Fed. 194, rendered by First Circuit Court of Appeals, seems to us about the most illogical we have ever seen. The decision affirmed the circuit court's summary dismissal of the cause because it was "in contempt and evasion of law and in defiance of a final decree entered under the order of the United States Supreme Court."

This reads well enough as a general principle, but before a court undertakes to dismiss a case for any such reason it should first determine whether or not it has any jurisdiction to take such a step. If it has nothing to do with the case from the point of jurisdiction, it is railing by a court at the circumambient air.

The facts are, as claimed by the opinion, that a complainant brought suit in a state court, and upon the case being removed upon compliance with the statute, there was a motion to remand upon the ground that there was no diversity of citizenship. The federal court instead of confining its consideration to the motion, looks at the pleadings and finds therefrom that there was an attempt at a collateral attack upon the judgment of the federal court. On this it refuses to consider the motion to remand, speaking as follows: "Having found the proceedings to be in contempt and in evasion of the decision already made, we are not aware of any imperative rule of law which required the circuit court to lend potency to its existence by considering the question of diverse citizenship, or on motion of complainants, who held its decrees in contempt, to lend force to their offending purpose by remanding their case to the state court. If the requisite citizenship did not exist, as the complainants claimed, surely the order of dismissal violated no substantive right."

Why does any court wish to make any pronouncement before it determines whether or not it will have any legal effect?

It was in vain that movant urged that a plea in bar was a plain remedy. The court said: "That is not the only remedy, and where the identity of the property is unmistakable, and the purpose to disestablish the result is clear, courts may not always subject parties to another trial upon a plea in bar, and to the expense and delay incident to such a defense." True again. But this is where a court with jurisdiction is acting. Nobody cares about what a court without jurisdiction thinks of the matter.

The movant also urged that "judicial invasion" was thus involved. The opinion speaks of the history of American courts being "not one of judicial invasion," and then demonstrates this by refusing to give the state court an opportunity to follow American precedent, by itself committing an act both of doubtful propriety and doubtful jurisdiction.

It really looks like the federal court was suspicious about the disposition of the state court, and was endeavoring to forestall an impartial consideration of complainants' rights therein in a question that could there be presented in an orderly way.

We think less heat and more calm might not be unprofitably sought for by the honorable occupants of the bench delivering itself of the decision above alluded to, and that finding the latter would scarcely make them derogate from their dignity.

NEGLIGENCE—INJURY CAUSED BY BARGAIN-COUNTER ANNOUNCEMENT IN A CROWDED STORE.—Evidently it is not within the judicial cognizance of the Supreme Judicial Court of Massachusetts that a headlong rush would be precipitated in a department store, filled with bargain-hunters, by a verbal announcement, to the crowd, of bargains at a jewelry counter.

In the case of *Lord v. Sherer D. G. Co.*, 90 N. E. 1153, it appears that the management of a department store had by special advertisements drawn a large crowd of prospective customers. Into this seething mass an announcement was thrown of articles at a very low price at its jewelry counter. It acted as instantaneously as a cry of fire. Those on the upper floor rushed to and down the stairway, and plaintiff, a child under six years of age, was caused to fall down the steps and be injured.

The learned court said: "It has often been adjudged that a common carrier is held to the exercise of proper care to protect his passengers from injury by reason of jostling, pushing or other rough acts of a crowd which he al-

lowed to collect in his cars, or upon his platforms, especially elevated platforms. * * * It cannot be said, however, that a merchant is negligent simply because he has his store crowded with customers, or because while the store is crowded he directs their attention to some part where they can get good bargains. That is what the store is for. * * * The stairs were of ordinary construction, and the defendant had the right to assume that under the circumstances there was no reason to anticipate any danger to those upon them."

There seems to us here a considerable grit of bad law. Here was a store designedly intending to bring a crowd to its counters and it is excused from looking after the safety of children in its swirling embrace, because "that is what the store is for." Then the court says: "The defendant had the right to assume" that people already inflamed by their cupidity or curiosity would do no harm when excited to a higher pitch. That was distinctly a jury question.

These department stores make of themselves, by the lures they hold out, public places as distinctly as are railroad platforms, and there are more dangers in them than on the latter. The invitation to be there is more pointed, and the hope of profit is more apparent. The Massachusetts court should refresh its recollection of things in the realm of judicial notice.

MASTER AND SERVANT—CONSTITUTIONALITY OF STATUTE REQUIRING EMPLOYER TO STATE TRUE CAUSE OF DISCHARGE.—We noted in 69 Cent. L. J. 219, the case of *Atchison, T. & S. F. R. Co. v. Brown*, 80 Kan. 312, 102 Pac. 459, on this subject and commended the conclusion of the Kansas Supreme Court that a statute requiring an employer to furnish in writing to a discharged employee, upon his request, the true cause or reason for his discharge was unconstitutional. A late case from Texas Civil Court of Appeals holds a similar statute constitutional. *St. Louis, S. W. Ry. Co. v. Hixon*, 126 S. W. 338.

The opinion, to which there was no dissent, discusses the Brown case and that of *Wallace v. Railway*, 94 Ga. 732, 22 S. E. 579, both being opposed to the Texas ruling.

The reasoning whereby the Texas court seeks to justify its conclusion is not a very exalted kind—hardly, we might say, deserving place as a judicial utterance. We present it in its entirety.

"The decision in the Wallace case was rendered by the Supreme Court of Georgia in 1894, and the statute under consideration was entitled, 'An act to require certain corporations

to give to their discharged employees and agents the causes of their removal or discharge, when discharged or removed.' Acts 1890-91, p. 188. It authorized a recovery for \$5,000 as a penalty for their failure to comply with the statute. No injury seems to have been alleged by the plaintiff, but the suit was brought to recover the penalty arbitrarily fixed by the statute. The decision in the case of Atchison, T. & S. F. Ry. Co. v. Brown, is by the Supreme Court of Kansas, and is based on the ruling in the Georgia case. It may be that the conditions existing in Texas at the time of the passage of the statute under consideration did not exist in Georgia at the time of the passage of the statute construed in the Wallace decision. The statute here under discussion was passed to meet and remedy an evil that had grown up in this state among railway and other corporations to control their employees. It seems that a custom had grown up among railway companies not to employ an applicant for a position until he gave the name of his last employer, and then write to such company for the cause of the applicant's discharge, if he was discharged, or his cause for leaving such former employer. If the information was not satisfactory to the proposed employer, he would refuse to employ the applicant. They could thus prevent the applicant, by failing to give a true reason for his discharge or blacklisting him, from procuring employment in either instance. Even if the statutes construed in the cases cited were in all respects similar to the statute before us, we would not be inclined to follow those decisions. It was to compel the former employer to state the true cause of its employee leaving its service, and to prevent blacklisting, that brought about the passage of this statute. We have statutes in this state more exacting and drastic than the statute under discussion, which are being enforced daily, and no decision of the appellate courts is cited holding them unconstitutional."

We refer to reasons for our approval of the Kansas ruling to our former note, and here suggest that it seems to us, that what the Kansas opinion said as to police power of the state not excusing such an invasion of a personal constitutional privilege is not met by the recited conditions of which the Texas court takes judicial notice. If the custom referred was to a legal custom, its practice did not justify the statute.

If it amounted to a conspiracy, a discharged employee suffering therefrom, should base his action thereon. Or if a discharging employer acted unjustly, knowing the consequences under such custom, to an employee, that would be a tort. The unconstitutionality lies in the

fact that a statute seeks to compel one not in court to furnish evidence to his adversary that he may exercise his opinion in using it against him or not.

LIABILITY OF OWNER OF IRRIGATION DITCH FOR DAMAGES ARISING FROM ITS CONSTRUCTION AND MAINTENANCE.

1. The owner of an irrigation ditch is not an insurer of his ditch against damages which may result from its operation.

2. The owner of an irrigation ditch, where his negligence or unskillfulness in constructing, maintaining or operating the ditch is sufficiently established, is liable in damages for the resulting injuries.

The principal difficulty to be found in analyzing cases which have been decided upon one or the other of the two propositions of law above stated, is in the failure to observe whether the damages asked for have resulted from intentional injury done by defendant by the direct application of force, or, whether the damages asked for, have resulted indirectly by reason of the defendant's negligence or blameworthy remissness or lack of care.

This difference is clearly set forth in the case of Fleming v. Lockwood.¹ Here damages were asked because water had seeped from defendant's ditch on to the lands of plaintiff, making them wet and marshy and destroying the hay growing thereon. Plaintiff asked the court to instruct the jury to the effect that, if plaintiff's lands were injured by seepage waters from defendant's ditch, then the verdict should be for the plaintiff without regard to the question of negligence on the part of the defendant in the construction or operation of the ditch. But, instead, the instruction given was to the effect that defendant was bound to use only ordinary care in the construction and maintenance of the ditch, and if he did exercise such degree of care, "then he would not be responsible for the damage

(1). Fleming v. Lockwood. 36 Mont. 384 (1907), 13 A. & E. Anno. Cases, 263, 10 C. L. 2016 and note 18.

complained of, through the seepage of water from his ditch, if you find from the evidence there was any such seepage." A verdict in favor of the defendant was rendered.

Says the court: "The plaintiff's theory of the case is illustrated by the instruction which the court was requested to give, as above set forth. (Substantially as above). The defendant's theory is illustrated by the instruction given by the court in lieu of that asked by the plaintiff. These different theories of the respective parties present the principal question for solution, and singularly enough, each of them is relying upon the former decision of this court to support his contention. Plaintiff relies upon *Fitzpatrick v. Montgomery*, 20 Mont. 181, 63 Am. St. Rep. 622, 50 Pac. 416, and *Lincoln v. Rogers*, 1 Mont. 217, and *Nelson v. O'Neal*, 1 Mont. 284, cited in the *Fitzpatrick* case; while respondent relies upon *Hopkins v. Butte*, etc., Commercial Co., 13 Mont. 223, 40 Am. St. Rep. 438, 33 Pac. 817, and upon *King v. Miles City Irrigating Ditch Co.*, 16 Mont. 463, 50 Am. St. Rep. 506, 41 Pac. 431. If appellant's theory is correct and the question of negligence does not enter into a case of this character, then every ditch-owner is an insurer of his ditch against damages therefrom to his neighbor, unless such damage is occasioned by an act of God or inevitable accident; and her counsel confidently rely upon the *Fitzpatrick* case above to support this contention."

In the *Fitzpatrick v. Montgomery* case above cited, the defendant was a placer miner conducting mining operations in a creek above *Fitzpatrick*'s lands. He permitted the tailings and other debris to float down the creek, where they lodged on plaintiff's lands, causing the creek to cut a different channel and render the lands unfit for agriculture purposes.

"The decision of this court appears to have been rendered upon precedent rather than upon principle, and nearly every case cited in the opinion relies upon and applies the principle which counsel for plaintiff sought to have the trial court in this case

embody in the offered instruction, namely: 'That every one must so use his property as not to injure that of his neighbor.' This principle of law finds expression in the maxim *Sic utere tuo ut alienum non laedas*, which our Civil Code in Sec. 4605, has translated as follows: 'One must so use his own rights as not to infringe upon the rights of another.'

"If the courts whose decisions are cited and relied upon in the *Fitzpatrick* case entertain the idea that this maxim is not applicable to negligence cases they are mistaken. While it is true that by adopting a code we have abolished common law forms of pleading, this abolition has not in any sense changed the fundamental rules of substantive law, and we must still resolve questions presented in our litigation with reference to those ancient rules of law which had reason, experience, and the necessity of society for their foundation.

"At the common law the *Fitzpatrick* case would have fallen into one of two classes of cases, trespass, or trespass on the case, the first of which might, or might not, involve a question of negligence, depending upon the particular circumstances, while negligence is the very gist of the latter.² Holmes on Common Law, 106. The maxim above was repeatedly applied in actions of trespass. It was likewise applied repeatedly in actions of trespass on the case. In *Gerke v. California Steam Navigation Co.*, 9 Cal. 251, 70 Am. Dec. 650, the court said: 'The general rule upon this subject is laid down with great clearness by Cowen.' (Cowen's Treatise, 384). Speaking of action of trespass on the case, he says: 'It lies in all cases of negligence in the use and disposition of one's property, or in the clearing or improving it, by which another is injured; and the true question in such cases is whether the defendant or his servant has been guilty of negligence. For it is a maxim in law that a man is bound so to use his own as not to injure that which belongs to his neighbor.'³

(2.) Foundations of Legal Liability, Vol. I, p. 74.

(3.) See note 4 Foundations of Legal Liability, Vol. I, p. 193.

"Since negligence is the very essence of an action of trespass on the case, and negligence was held not to enter into the Fitzpatrick case, we must assume that the case was treated as an action of trespass, and of that character of such an action which is maintainable without reference to the question of negligence; in other words the court must have held that Montgomery's situation was practically the same that it would have been had he hauled the debris in carts and deposited it upon Fitzpatrick's land, in which latter event, of course, the degree of care which he exercised would have been of no moment. This, at least, is the theory of most of the cases cited in this opinion in the Fitzpatrick case; and while it is a matter of doubt whether the Fitzpatrick case was of such a character, it was evidently treated as such, for upon no other possible theory can it be sustained.

"Familiar illustrations of the difference between an action in trespass, where negligence need not be alleged and proved, and an action of trespass on the case, which must be maintained, if at all, upon the theory of defendant's negligence, are these: If A strikes B with a log, B may maintain an action in trespass, and the question of negligence does not enter into the case at all. But if A places the log in a road, and B comes along and falls over it and injures himself, he may maintain an action on the case against A, by alleging and proving A's negligence. *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677.⁴ So, if A opens a head gate in his ditch and sends down water on B's land in such quantity as to cause injury, B could maintain an action in trespass; but if A's ditch gives way, precipitating water upon B's land, B's action will be on the case; and the reason for the rule in each of these classes of cases is apparent. An action of trespass presumes the active agency on the part of the wrongdoer in causing the injury, or, what is the same thing, the doing of the act wantonly or in total disregard of the other's right; while the action on the case assumes that the injury is con-

sequential, or the direct injury is the result of negligence or nonfeasance. In other words, trespass implies wantonness, malice, or wilfullness, while trespass on the case implies only negligence."

In the *Hopkins v. Butte, etc., Commercial Co.* case (cited above), defendant had caused damage to plaintiff's land and crops by using a creek which ran past plaintiff's premises, in which to float down logs to the mills. The logs had formed a jam in the creek, causing an overflow of water on plaintiff's land, when the jam broke and damaging his crops, fences, etc. The court in this case said: "The gist of this action is negligence; and until some negligence is shown there cannot be said to be any liability."

In the *King v. Miles City Irrigating Ditch Co.* case (cited above), damages were asked by reason of break in defendant's ditch permitting the water therefrom to escape and injure plaintiff's lands. The trial court instructed the jury as follows: "In this connection the court further instructs the jury that it is incumbent upon the defendant company to construct its flumes and ditches in such a reasonable and prudent manner as that no damage shall result to the person whose lands are crossed by the ditch." This court on appeal said: "The instruction was clearly erroneous. The court undertook to lay down the measure of reasonable and prudent conduct on the part of the defendant. The court did not instruct that the care by the defendant should be either ordinary or extraordinary, but, on the other hand, instructed the jury that the degree of care should be such that no damage should result. The defendant was thus held, not only to the highest and most extraordinary degree of care, but was held to exercise such care that the plaintiff would not suffer any damage. In other words, the instruction made the defendant absolutely an insurer against all damages. It removed the question of negligence from the jury altogether, and practically instructed them that, if the damage occurred, the defendant was liable without regard to his negligence."

No other case, on the particular subject involved in the above case, has come within the writer's inspection, but in Street's Foundations of Legal Liability, we find the matter treated from the beginning. Speaking of the early distinction between private wrongs done with and without force, the author says:⁵ "Consideration of the difference between violent and non-violent injuries will in fact give a clearer perception of certain fundamental notions underlying the evolution of civil liability than can be gotten from any other view. The difference can perhaps be truly indicated as follows.

"In the field of trespass liability is based solely upon the fact that damage is directly done by force. No consideration is here taken of the moral qualities of the act which results in damage. The actor may or may not be culpable or morally blameworthy. He may or may not have intended to do the harm complained of. All discussion on this point is, as a matter of primary principle, entirely irrelevant. In the field of wrongs not characterized by a display of force, it is different. Here the law does not impose liability unless the injurious act or omission complained of exhibits in some form the element of blameworthiness. Fraud, malice, negligence, will occur to the reader as forms of blame which, in one connection or another, are accepted as a basis of liability.

"The moral ingredient thus appears to be negligible in wrongs of direct violence, while in other torts it is of prime importance. The internal development of the law of tort is largely a result of the display of these two ideas of absolute liability and of liability conditioned upon some form of fault or actual moral delinquency. The first idea is harsh. Hence as the law becomes humanized and as the legal mind becomes educated to realize the truth that the fault of the actor is a factor which has a rightful place in determining liability, the theory of trespass is ameliorated."

Again this author says, speaking of the old view held in cases of the seventeenth

(5). Foundations of Legal Liability, Vol. I, p. 2.

and eighteenth centuries:⁶ "Notwithstanding these authorities the proposition that a man is liable in trespass for all direct harm accidentally done by him in the immediate performance of a lawful act is untenable; and a milder doctrine is now accepted that defendant in trespass can always excuse himself by showing that the injury complained of was purely accidental and that it happened without any fault of his. Some degree of negligence or blame must be imputable to the defendant or he cannot be held."

Again:⁷ "We now proceed to consider the relation between the conception of negligence and liability in the field of trespass. The proposition on which attention is here to be focused is this: For intentional injury done by the direct application of force a man is absolutely liable. For injury done by the direct application of force under such circumstances that the law can ascribe to the actor an intention to do harm, he is also absolutely liable. But where actual intention is absent and the circumstances are such that the law will not raise a presumption of intention against the actor, here liability cannot exist, unless negligence, in the sense of some degree of blameworthy remissness or lack of care, on the part of the actor is shown. In other words, negligence is essential to liability for unintentional injury, and it is good defense in an action of trespass for unintended harm for the defendant to show that he was in no way negligent or to blame in doing the act which proximately caused the damage."

Standard of Care: On this subject Mr. Street writes:⁸ "The legal test of negligence, whether negligence be conceived as a sort of legal or moral delinquency or whether it be conceived as a breach of implied duty, is this: Did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordi-

(6). Foundations of Legal Liability, Vol. I, p. 73.

(7). Foundations of Legal Liability, Vol. I, p. 73.

(8). Foundations of Legal Liability, Vol. I, p. 96.

nary prudent person would have used in the same situation? If not he is guilty of negligence. Stated in another way, conduct is said to be negligent when a prudent man in the position of the tort feasor would have foreseen that a harmful effect was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences."

JOHN E. ETHELL.

Colorado Springs, Colo.

ACCORD AND SATISFACTION—PART PAYMENT.

PARKER v. MAYES.

Supreme Court of South Carolina, April 1, 1910.

Payment of a sum smaller than a liquidated debt, pursuant to a simple contract to accept such sum in satisfaction of the whole debt, only operates as payment pro tanto, notwithstanding the agreement.

JONES, C. J.: This is a suit upon a promissory note dated February 29, 1904, signed by the defendants, who jointly and severally promised to pay to the order of S. C. Cook \$1,200 sixty days after date. Cook indorsed and delivered the note to S. M. French before maturity, but, as matter of fact, the note was taken for property belonging to French and sold by Cook as his agent and French was real owner of the note when it was executed. French became bankrupt, and plaintiff became owner and possessor of the note as trustee in bankruptcy. The defendant Anderson was not served, and judgment was not demanded against him. Upon the trial Judge Dantzler directed a verdict against defendant Mayes for \$847.38.

Upon a previous motion Judge Shipp made order striking out from defendant's answer after the word "here'n" on second line down to and including "payment" on last line of the following which constitutes the second defense: "(1) That he admits that he signed the note, as set out in the complaint herein, (but alleges that it was understood and agreed by all parties at the time that he signed it that he was liable for one half thereof only, and that this defendant is informed and believes and alleges that S. M. French, the party to whom the note was transferred by S.

C. Cook, was advised of and fully knew all these facts when he acquired the aforesaid note. (2) That, when the said S. M. French caused the said note to be presented to this defendant for payment, this defendant denied liability for any amount of the said note save and except one-ha'f thereof, and advised the aforesaid S. M. French that he would resist payment, if necessary, by litigation, whereupon said French agreed with this defendant that, if he would pay the one-half thereof, said amount would be accepted in full of all this defendant's liability thereon, and he would be released from all further liability thereon; whereupon, and in consideration of this agreement and understanding between this defendant and the said S. M. French, this defendant paid to the order of the said S. M. French the one-half of the said note. That the said amount was accepted with this understanding and with a memorandum of the same made on the check that this defendant gave in payment.)" In appealing from the judgment on verdict appellant assigns error to the order of Judge Shipp.

Even if we should waive the point that appellant should have appealed from the order of Judge Shipp, there was no error. The allegation as to the contemporaneous agreement was in conflict with the well-established and salutary rule which forbids parol testimony to vary or contradict the terms of a written instrument. The note was both joint and several, "we or either of us prom'se to pay," and the alleged agreement was to the contrary. Parol evidence of a contemporaneous, collateral, or independent agreement is only admissible when it does not vary or contradict the writing. *Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Ashe v. Railroad Co.*, 65 S. C. 138, 43 S. E. 393; *Earle v. Owings*, 72 S. C. 364, 51 S. E. 980; *Clarke v. Insurance Co.*, 79 S. C. 499, 61 S. E. 80. The subsequent agreement alleged could not avail defendant. As declared in *Ex parte Zeigler*, 83 S. C. 80, 64 S. E. 513, 21 L. R. A. (N. S.) 1005, the rule derived from *Pinnel's Case*, *Coke*, v. 117, is enforced in this state. "The payment of a sum smaller than a liquidated debt in pursuance of an agreement, not under seal, to accept such sum in satisfaction, cannot be satisfaction of the whole. Such payment notwithstanding the agreement operates only as a payment pro tanto." After this, and before trial, motion was made before Judge Dantzler to amend the answer so as to allege that defendant "has paid in full all his liability on the note described in the complaint and that he is fully discharged from all further liability or responsibility on account of the

said note by reason of said payment," which motion was refused and exception is now taken to such refusal. "Such motions are addressed to the discretion of the circuit judge, and his action is not subject to review by this court, unless there has been an abuse of discretion." Clerks' Union v. Knights, etc., 70 S. C. 550, 50 S. E. 206. We see no abuse of discretion in this case.

There is nothing in the record to show that it was made to appear to the court that the amendment sought to plead payment otherwise than as attempted in the matter previously stricken out. Moreover, since the complaint alleged credits and that there was a specified balance due, defendant could have shown other payments under the general denial. *McElwee v. Hutchison*, 10 S. C. 436.

The foregoing conclusions control the remaining exceptions to the exclusion of testimony, for the excluded testimony merely related to the alleged defense stricken out by the order of Judge Shipp.

The exceptions are overruled, and the judgment of the circuit court is affirmed.

NOTE—The Strictness of the Rule of Acceptance of Smaller for Larger Sum Not Being Satisfaction.—It is undoubted that the debt to which the rule applies is one that is liquidated—there must exist no *bona fide* dispute as to the amount. We consider it unnecessary to cite authority for this proposition. Chief Justice Fuller, in Chicago, Milwaukee, etc., Ry. Co. v. Clark, 178 U. S. 353, 364, said even to this, however: "The rule has been much questioned and qualified," and: "The result of modern authorities is that the rule only applied when the larger sum is liquidated, and when there is no consideration whatever for the surrender of part of it; and while the general rule must be regarded as well settled, it is to be considered so far with disfavor as to be confined strictly to cases within it."

If one pays in advance a less sum than is due there is consideration for accord and satisfaction. *Weiss v. Marks*, 206 Pa. 513, 56 Pa. 59; *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724. If there is a claim of set-off this takes the transaction out of the rule. *Pohlmann Coal v. St. Louis*, 145 Mo. 651; *Ostrander v. Scott*, 161 Ill. 345; *Farmer v. Merrill*, 108 Mich. 61. "Courts are prone to uphold, when possible, an agreement by which a creditor accepted less than was due in satisfaction of a demand, instead of defeating the agreement for want of a consideration; and a very slight consideration will be held sufficient." *Tucker v. Do'an*, 100 Mo. App. 442, 456. See also *Rotan Grocery Co. v. Noble*, 36 Tex. Civ. App. 226, 81 S. W. 586.

Where judgment debtor was insolvent and contemplated resorting to bankruptcy, his creditor's acceptance of lesser amount was held to bind to an agreement of satisfaction. *Hanson v. McCann*, 20 Colo. App. 43, 76 Pac. 983. In this case "there was no formal agreement, but the appellant (creditor) was advised that a resort to

bankruptcy was contemplated by the appellee and to insure himself of a sum certain rather than run the risk of being compelled to take a smaller sum, or losing his whole claim, he entered into the agreement of compromise. The contract is, therefore, supported by good and valid consideration." The opinion cites *Dawson v. Beall*, 64 Ga. 328; *Hinckley v. Arey*, 27 Me. 362. Here it is perceived it was allowed to go outside of the terms of the agreement and prove the surrounding circumstances to validate the agreement.

In *Engbretson v. Seiberling*, 122 Iowa 522, 98 N. W. 319, 64 L. R. A. 75, 101 Am. St. Rep. 279, it was said: "The sole question for our consideration is whether the acceptance from an insolvent debtor of part payment in full satisfaction of a claim is founded upon such consideration that the entire debt is thereby discharged." Then the court, admitting that this exact question had not before been squarely presented, said that prior Iowa decisions "certainly indicate a predisposition to regard the insolvency of the debtor as a matter which might be considered in determining the validity of an agreement to accept part payment in full discharge." Then the court holds in the affirmative of the above question, and cites numerous cases to same effect. If the payment is made out of a particular fund belonging to the insolvent, which can only be reached by the creditor in accordance with the agreement this accomplishes satisfaction. *Dalrymple v. Craig*, 149 Mo. 345, 50 S. W. 884. *Semble v. Shelton v. Jackson*, 20 Tex. Civ. App. 443, 49 S. W. 415.

In *Lincoln Sav. Bank, etc. Co. v. Allen*, 82 Fed. 148, 27 C. C. A. 87, in an opinion by Sanborn, C. J., Eighth Circuit Court of Appeals, held that an agreement to accept cash and certain of several collateral notes held by the creditor and surrender to the debtor of the others, in full satisfaction, was valid though the cash and face of the notes given the creditor did not equal the debt. The court said: "There is sufficient consideration to support the contract in the fact that it relieves the creditor of the expense and trouble of a sale of the collaterals under the pledge and converts them at once into money applicable to the payment of the debt."

In Indiana it was held that acceptance of the note of a third party for a less sum operated, under agreement, to extinguish the debt. *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. 537. And so of the debtor's note indorsed by a third person. *Fred v. Fred* (N. J. Eq.), 50 Atl. 770. *Contra* as to note of third person of less amount, *Mannakee v. McCloskey*, 23 Ky. Law Rep. 515, 63 S. W. 482.

Judge Sanborn later treated the question of accord and satisfaction in a case, where articles of less value than an amount due were surrendered in satisfaction of the debt. *Missouri Am. Elec. Co. v. Hamilton-Brown Shoe Co.*, 165 Fed. 983, 91 C. C. A. 251. In reply to counsel invoking the rule that there was no satisfaction in accepting part of a sum for the whole the opinion said: "The rule invoked is indisputable, but it applies only when part payment is made in the same medium called for by the obligation, as in money if money is due, in corn if corn is due, by the terms of the agreement. Where articles other than those for which a contract provides are paid and received in satisfaction of it, they constitute a sufficient consideration for its dis-

charge, although they are of much less value than that due, and this because the legal presumption obtains that they had a special value to the recipient. Such a transaction is necessarily an accord and satisfaction, and a release of an obligation founded upon it is valid." Thereupon are cited the following cases: *Very v. Levy*, 54 U. S. 345, 359; *City of San Juan v. St. John's Gas Co.*, 195 U. S. 510; *Neal v. Handley*, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784; *Dimmissek v. Sexton*, 125 Pa. 334; *Bull v. Bull*, 43 Conn. 455. It would seem that confining the rule to payments in the same medium receives a very technical application when articles of a fixed market value are offered because they could not be presumed to have "a special value to the recipient." No one cares for a particular bushel of wheat and it is bought or sold according to grade. As, however, the rule itself is, as said, "in disfavor," exceptions even technical are admissible to displace it.

In one or two states statutes have displaced the rule as to which we have been instancing exceptions. It is a harsh rule argued against in a general way by many courts, but it is distinctly recognized as witness especially the many cases, not attempted here to be cited, of checks being sent with condition written thereon of payment in full.

The rule applies to part payment of a judgment, of course, but it has been held, that if a judgment may be appealed from, and appeal proceedings are abandoned in consideration of agreement to accept a less for a larger sum in full satisfaction, such agreement is enforceable. *Roberts v. Bause* (N. J. L.), 72 Atl. 452.

C.

JETSAM AND FLOTSAM.

RE FEDERAL TAX ON INCOME OF CORPORATIONS.

Corporations are persons within the meaning of the fourteenth amendment to the Constitution of the United States.

Certain corporations, like national banks, the Pacific railroad companies, and post roads, have been created under power of congress, to coin money, to establish post-roads and roads for the conveyance of munitions of war.

All other corporations are created under the laws of the various states of the Union.

"The power to tax involves the power to destroy."

"The power to tax all property, business and persons within their respective limits is originally in the states and has never been surrendered" to the federal government.

I believe the law is unconstitutional and void for the following reasons:

First: Because the law goes to the life of the corporation. The tax imposed is, strictly speaking, a franchise tax. If the reports required are not made or if the tax is not paid the further existence of the corporation is terminated.

(a) Such a tax may be levied by the federal government upon a corporation which it creates, viz., national banks, the Pacific railroads, post-roads, etc.

(b) But cannot be levied upon corporations created by the state and from which the state derives its revenue for governmental purposes.

Second: Because the tax is a tax upon an artificial being created by the state, recognized as a person under the law, and is a direct tax upon it, and is unconstitutional and void as an excise tax. It does not come under the provision of the constitution providing for direct taxation, which is as follows: That "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed."

Third: The tax is void because it is not uniform as a duty, impost or excise tax, as provided in paragraph 1, section 8, article 1, of the constitution, which is as follows: "All duties, imposts and excises shall be uniform throughout the United States."

(a) Because it exempts corporations with a net income of less than \$5,000 and therefore exempts the commodity manufactured or produced by such corporations from the burden of the tax.

(b) Because the tax is a burden upon the commodity or income of a corporation, and no like tax is imposed upon the commodity or income of an individual or co-partnership.

(c) Because it permits the corporation which pays rental to deduct the amount paid for rentals and does not permit the corporation owning its own plant to deduct a like amount for the use of its plant, and therefore shows it to be a direct tax on real estate or the income thereof.

(d) Because it permits the corporation to deduct "all amounts received by it within the year as dividends upon stock of other corporations . . . subject to the tax hereby imposed," therefore permitting a parent or holding corporation to hold the stocks of several corporations, each of whose incomes is less than \$5,000 a year, but the aggregate income of the parent or holding corporation might exceed many times \$5,000 and it would be exempt from the tax.

Fourth: The tax is void because it is levied upon the gross income less certain specified deductions. The attorney general has said that it is not a tax upon the profits but upon the entire net income over and above \$5,000 received from all sources during the year, and defines the income which is to be reported in the returns to be "actual receipts and payments." This income, therefore, necessarily includes the income from real estate and the income from the use of personal property, which it has been held cannot be taxed.

Fifth: The act as construed by the commissioner of internal revenue is unconstitutional and void because it imposes a tax upon the gross profits of the corporation less the specific deductions provided by law. It is a direct tax upon the income of real estate and is therefore a tax upon real estate. It is a tax on the income derived from the use of personal property and is therefore a tax upon the personality which, it has been held, cannot be taxed in this manner.

Sixth: When a corporation received its charter from the state of its creation, that charter is a contract between the state and the corporate body. The state cannot forfeit that charter except for abuse of the laws of the state by the corporation, which laws are by implication a part of the charter. This protection is given to the corporation by the federal constitution, which provides that no state shall pass any law impairing the obligation of contracts. The fed-

eral constitution does not grant to congress any power to pass any law to impair or destroy a contract entered into between the state and the corporate body.

Seventh: Under the federal constitution without any legislative enactment the federal courts have denied to the state the right to lay any discriminating burden or tax, however small, upon interstate commerce. The states have been denied by the federal courts the right to levy any franchise tax or corporation tax upon corporations created by the federal government. The states have never surrendered to the federal government the power to tax "all property, business and persons within their respective limits." The federal government therefore has no power to directly tax an artificial being created by the state in the manner adopted in the present act.

Eighth: I believe a state has power ordinarily to tax property for the current year by an act not passed nor approved until after the beginning of the year. A state may enact a law after the beginning of a year imposing a franchise tax upon corporations doing business in the state for the whole calendar year, and that it would not be an *ex post facto* law, if that tax is not based upon the income or profits of the corporation. But an act like the present one, imposing a tax upon the income of a corporation, as defined by the attorney general, or upon the profits of a corporation, as defined by the commissioner of internal revenue, which tax really takes effect at a time several months antedating the passage and approval of the act, is a burden upon transactions which are closed; is a burden upon transactions made prior to the act and which may be executory. It therefore impairs the obligation of those transactions to the extent of the tax, as there is no power delegated to congress, express or implied, to warrant it in enacting a law impairing the obligation by the federal government. The states' action of contracts, and as the federal constitution particularly prohibits the states from passing such a law. I therefore believe that the law is unconstitutional and void.—National Corporation Reporter.

SPECIFIC PERFORMANCE TO CONVEY ON WIFE'S REFUSAL TO JOIN IN DEED.

ADDENDUM TO ANNOTATION.

In our annotation to *Maas v. Morganthaler*, 70 Cent. L. J. 282, we inadvertently overlooked a late Missouri case, among those opposed to the principal case, and, as there is by the prevailing and dissenting opinions a very full discussion, with the elaborate citation of authority from other states, of the important question considered, we call special attention to it. *Aiple-Hemmelman R. E. Co. v. Spelbrink*, 211 Mo. 671, 111 S. W. 480.

The court was divided upon this question, the prevailing opinion reversing the lower court being by a majority of four to three. Judge Lamm speaking for the minority, says, "The conclusion reached seems contrary to the directions sent down in *Kilpatrick v. Willey*, 197 Mo. l. c. 172-3," and then quotes such directions, to the effect that, on the wives of plaintiffs refusing to join in the conveyance, the present worth of their dower interests be ascertained and deducted. The majority opinion admits the contrary ruling as an abstract proposition of law,

but says that there was no such question in that appeal." But whether there was or not, it is certain that the ruling had a concrete effect. It appears to this annotator that the reasoning for an exception advocated by the majority in the Missouri case is well based and consonant with good policy in respect to the marital relation, but a great array of authority in this country, opposed to such exception, makes it appear somewhat inapt the majority opinion expression of surprise at this view being taken.

We express our thanks to one of our correspondents for calling attention to the Spelbrink case.

C.

BOOK REVIEWS.

BELL ON PRINCIPLES OF ARGUMENT.

This book, in one volume, octavo size, in cloth, of 330 pages, is a very creditable production. It submits practical suggestions as to theory of argumentation towards the end of producing conviction, and illustrates the text with excerpts from works on logic, speeches and addresses in a forcible way. The various methods of reasoning are shown, and the effort of the author to apply practically the rules which are found in writings more metaphysical or philosophical in character, is very successful. We appreciate the task set by the author for himself was not an easy one, and his appreciation of this has made him give that respect to logic as a science to which it is entitled. It will certainly benefit any lawyer to study this book—it will above all things make him quick to detect fallacies in his opponent's argument as well as resourceful in pressing his own.

The table of contents evidents the wide and thorough range of the author's discussion. Chap. I., Inference and Argumentation; Chap. II., Proof; Chap. III., Classification of Arguments; Chap. IV., Arguments from Experience; Chap. V., Arguments from Authority; Chap. VI., Deductive and Inductive Arguments; Chap. VII., Conditional and Unconditional Arguments; Chap. VIII., Direct and Indirect Arguments; Chap. IX., Disproof; Chap. X., Refutation; Chap. XI., Arrangement of Arguments; Chap. XII., Some Hints on Debating.

The style of the author is clear, his subject well divided and the subdivisions in orderly procession toward the end aimed at. The author is Mr. Edwin Bell, LL. B., and the book is from the presses of Canada Law Book Company, Ltd., Toronto, and Cromarty Law Book Company, Philadelphia, 1910.

HUMOR OF THE LAW.

"Have you," asked the judge of a recently convicted man, "anything to offer the court before sentence is passed?"

"No, your Honor," replied the prisoner, "my lawyer took my last cent."—Stray Stories.

"Now, Pat," said a magistrate to an old offender, "what brought you here again?"

"Two policemen, sir," was the laconic reply.

"Drunk, I suppose," queried the magistrate.

"Yes, sir," said Pat, "both av thim."

WEEKLY DIGEST.

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1. Aliens—Naturalization.—The federal government in authorizing state courts to act in naturalization proceedings selects such courts and the clerks thereof as government agencies, through whom the government is discharging a function of sovereignty.—*Eldredge v. Salt Lake County, Utah*, 106 Pac. 939.

2. Attachment—Motion for Discharge.—A motion for immediate discharge of property seized in attachment proceedings, when claimed by another, who interpleaded, if a substantial question as to ownership between defendant and interpleader arose, should be overruled.—*Western Grocer Co. v. Alleman, Kan.*, 106 Pac. 997.

3. Bail—Custody of the Law.—One charged with crime, and at large on bail, held constructively in the custody of the law, for he is in the custody of his bondsmen, who are his jailors.—*Netograph Mfg. Co. v. Scrugham, N. Y.*, 90 N. E. 962.

4. Bankruptcy—Adjudication.—From a bankrupt's adjudication until the appointment of a trustee the bankrupt is not to be regarded as civilly dead.—*Plaut v. Gorham Mfg. Co., U. S. D. C., S. D. N. Y.*, 174 Fed. 852.

5. Conditional Sales.—A trustee in bankruptcy has no greater title to the bankrupt's property sold to him under a conditional contract sale than the bankrupt had.—*John Deere Plow Co. v. Anderson, U. S. C. C. of App., Fifth Circuit*, 174 Fed. 815.

6. Grounds for Refusal of Discharge.—In order to be "false" so as to bar a discharge, the representations made by a bankrupt to obtain credit must have been willfully or intentionally misleading.—*In re KYTE, U. S. D. C., M. D. Pa.*, 174 Fed. 867.

7. Jurisdiction of Federal Court.—A federal court held without jurisdiction of a suit by a bankrupt's trustee to establish an expired lease as an asset of the bankrupt's estate.—*Plaut v. Gorham Mfg. Co., U. S. D. C., S. D. N. Y.*, 174 Fed. 852.

8. Lien for Rent to Become Due.—Where the landlord of a bankrupt had a lien on the property on the leased premises for "rent due and to become due" by the express terms of the lease and also by Sayles' Tex. Ann. Civ. St. 1897, art. 3251, for rent due and to become due for the current contract year, such lien is enforceable against the trustee in bankruptcy for rent to become due during the remainder of the contract year in which the bankruptcy occurs, and which has become due prior to the adjudication of the claim.—*Martin v. Orgain, U. S. C. C. of App., Fifth Circuit*, 174 Fed. 772.

9. Partnership.—Adjudication of a partner as a bankrupt authorizes the bankruptcy court to compel the transfer of the individual property of the partnership to the trustee by summary order.—*In re Lattimer, U. S. D. C. E. D. Pa.*, 174 Fed. 824.

10. Rights of Creditors.—Creditors are generally entitled to access to testimony taken by the referee while it remains in his custody.—*In re Samuelsohn, U. S. D. C., N. D. N. Y.*, 174 Fed. 911.

11. Set-Off Against Bankrupt After Discharge.—A court of equity will compel the assignee of a bankrupt to allow as a set-off a claim against the bankrupt, where injustice would otherwise result, though an action at law could not then be maintained.—*Wyckoff v. Williams*, 121 N. Y. Supp. 189.

12. Banks and Banking—Deposits.—Money paid into a bank after the death of the person entitled thereto, held not available to pay an obligation which the bank held against his estate.—*Padgett v. Bank of Mountain View, Mo.*, 125 S. W. 219.

13. Representation by Officers.—A bank which has intrusted the conduct of its affairs to its president, such conduct being within the range of the authority customarily given to such an officer, is bound to one who has parted with his money in good faith in reliance upon the authority so exercised, whatever may be

the limitations which the by-laws or resolutions of the board of directors in fact place upon it of which he has no knowledge.—*Citizens' Bank & Trust Co. v. Thornton*, U. S. C. C. of App., Fifth Circuit, 174 Fed. 752.

14. Benefit Societies—Assessment Rate.—A complaint in an action against an insurance organization held to state a cause of action for breach of a contract in raising its alleged fixed assessment rate.—*Jones v. Supreme Court of Independent Order of Foresters*, Wis., 124 N. W. 1027.

15. Bills and Notes—Assignment or Sale.—The maxim *caveat emptor* applies as well to purchasers of negotiable paper as to the purchaser of any other species of property.—*Bank of Ozark v. Hanks*, Mo., 125 S. W. 221.

16.—Statutes.—Under the statute, where the payee of a note has indorsed it to another and guaranteed its payment, the holder may sue the maker and the payee jointly.—*Taney County Bank v. Bray*, Mo., 125 S. W. 235.

17. Boundaries—Calls of Quantity.—A call for quantity in a deed held required to yield to the call of the field notes for the location of the boundary lines.—*Pratt v. Townsend*, Tex., 125 S. W. 111.

18.—Waters and Water Courses.—Where a party owns land on the bank of a navigable stream, his rights in the stream are bounded by the center line or thread of the stream, and lines run from the points where the boundaries of his land reach the stream to the center line of the stream, at such a point as to form right angles therewith.—*Farris v. Bentley*, Wis., 124 N. W. 1003.

19. Brokers—Revocation of Authority.—A broker's agency is revoked by the principal's disposition of his interest in the subject matter.—*Frazier v. Cox*, Ky., 125 S. W. 148.

20. Carriers—Rebates.—Where an express company refuses to carry liquor C. O. D., and plaintiff paid the return charges on packages not accepted, it would have been unlawful for the carrier to rebate these charges.—*L. Craddock & Co. v. Wells-Fargo Company Express*, Tex., 125 S. W. 59.

21. Chattel Mortgages—Sale of Property by Mortgagor.—Chattel mortgage, where the mortgagor by agreement was authorized to sell the mortgaged property and apply the proceeds to his own use, held void as to creditors.—*Citizens' State Bank of Tracy v. Brown*, Minn., 124 N. W. 990.

22.—Validity as to Creditors.—Chattel mortgage, where the mortgagor by agreement was authorized to sell the mortgaged property and apply the proceeds to his own use, held void as to creditors.—*Citizens' State Bank of Tracy v. Brown*, Minn., 124 N. W. 990.

23. Clerks of Courts—Compensation.—The principle that the incumbent of a public office

must discharge the duties thereof for the compensation fixed by law held not to prevent the clerk of a state district court performing services in naturalization proceedings, from retaining the fees as therein provided.—*Eldredge v. Salt Lake County*, Utah, 106 Pac. 939.

24. Commerce—License Tax.—Foreign sleeping car company cannot be restrained from doing local business in the state on its refusal to pay charter fee imposed by Gen. St. Kan. 1901, sec. 1264; such requirement amounting to a burden on interstate business and on property used outside of the state.—*Pullman Co. v. State of Kansas*, U. S. S. C., 30 Sup. Ct. 232.

25. Constitutional Law—Residence in State.—Held, that the constitutionality of the exceptions contained in Sess. Laws 1907, c. 132, secs. 3, 4, relative to the residence required of plaintiff in divorce, cannot be questioned by a person who does not fall within either of them, but who, under section 1, must reside in the state one year and the county three months.—*Pugh v. Pugh*, S. D., 124 N. W. 959.

26. Contracts—Validity.—A power of attorney to an agent having a contract to sell certain articles, to appoint other managing agents on the same terms, and furnish them with similar contracts and power to appoint yet other managing agents in an endless chain, was void, as contrary to public policy.—*Bank of Ozark v. Hanks*, Mo., 125 S. W. 221.

27. Corporations—Counties.—A creation of an unorganized county held a legislative, and the organization of a county an administrative, function.—*Board of Com'rs of Big Horn County v. Woods*, Wyo., 106 Pac. 923.

28.—Dissolution.—A judge of a circuit court has no jurisdiction in an equitable proceeding to dissolve a corporation where there is no statute conferring that jurisdiction upon the court.—*State v. Foster*, Mo., 125 S. W. 184.

29.—Insolvency—A sale of assets of an insolvent corporation to one of their number, approved by the stockholders held not void, but voidable, if unfair.—*Roberts v. Herzog*, Minn., 124 N. W. 997.

30.—Officers.—Even if a minor is disqualified from being a director in a Massachusetts corporation, that a director of a corporation was a minor would not prevent the transfer to the corporation of the good will of a business.—*Myott v. Greer*, Mass., 90 N. E. 895.

31.—Right of Stockholders to Inspect Books.—A stockholder of a corporation may properly demand an inspection of the books, for the purpose of prosecuting his claim against the corporation.—*State v. Monida & Yellowstone Stage Co.*, Minn., 124 N. W. 971.

32. Costs—Cost of Printing Abstract.—The cost of printing the part of appellee's abstract which was unnecessary to determine the questions involved held not taxable against appell-

lant on affirmance.—*Bonnewell v. Lowe*, Kan., 106 Pac. 1002.

33. Courts—Diverse Citizenship.—A suit may be brought in the federal courts by the holder of a note payable to bearer against the maker where their citizenship is diverse, though the maker and the payee were citizens of the same state.—*State Nat. Bank of Denison v. Eureka Springs Water Co.*, U. S. C. C., 174 Fed. 739.

34.—Error to State Court.—The construction of a prior decree of a state court and whether it bound parties subsequently coming in does not present any question which will sustain a writ of error from the federal Supreme Court to the state court.—*King v. State of West Virginia*, U. S. S. C., 30 Sup Ct. 225.

35.—Municipal Ordinances.—A bill by a telephone company to restrain the enforcement of a municipal ordinance fixing rates, on the ground that such rates are confiscatory, presents a federal question and is within the jurisdiction of a federal court.—*City of Owensboro v. Cumberland Telephone & Telegraph Co.*, U. C. C. of App., 174 Fed. 739.

36.—Rules of Decision.—Whether a deed of trust is valid or not is a local question, in the determination of which the federal courts will follow the decisions of the state court of last resort.—*In re Elletson Co.*, U. S. D. C., N. D. W. Va., 174 Fed. 859.

37. Damages—Breach of Contract.—Where defendant breached a contract with plaintiff whereby plaintiff was to cut and manufacture lumber at a certain price, the measure of damages was the difference between the contract price and the cost of doing the work.—*Ingham Lumber Co. v. Ingersoll & Co.*, Ark., 125 S. W. 139.

38.—Refusal of Buyer to Accept Goods.—On refusal of the buyer to accept a shipment of potatoes, the seller must dispose of them to the best possible advantage, so as to occasion the buyer the least possible damages.—*Ziegler v. C. J. Gerlach & Bro.*, Tex., 125 S. W. 80.

39. Death—Foreign Statute.—Action for death authorized by statute of a foreign country where death was caused may be brought in this state.—*Johnson v. Phoenix Bridge Co.*, N. Y., 90 N. E. 953.

40. Deeds—Estate Conveyed.—A clause in the habendum of a deed, that if a grantee died without bodily heirs the land should revert to the heirs of the grantor, which was in conflict with the granting clause, held void.—*Hughes v. Hammond*, Ky., 125 S. W. 144.

41.—Title of Grantor.—A grantee claiming land through a chain of title from the original grantee of a survey held to have a title from the sovereignty.—*Pratt v. Townsend*, Tex., 125 S. W. 111.

42. Divorcee—Attorney's Fees.—Attorney's fees, incurred by the wife in a divorce suit,

held recoverable from the husband if such costs were necessary.—*Hill v. Hill*, Tex., 125 S. W. 91.

43. Dismissal—Non-Suit.—Where parties are suing on a partnership claim, one of them may not dismiss the action against the objection of the other, unless the prosecution of the suit would result injuriously to him and if it might do so, the other partner may continue the action in the name of both upon indemnifying him against loss, if indemnity is demanded.—*Ingham Lumber Co. v. Ingersoll & Co.*, Ark., 125 S. W. 139.

44. Disturbance of Public Assemblage—Elements of Offense.—There can be no conviction of disturbing a congregation upon proof of a disturbance after the minister had dismissed the congregation.—*State v. Leonard*, Mo., 125 S. W. 234.

45. Dower—Waiver.—A widow's consent to the sale of her husband's real estate, all of which is necessary to pay debts, without advancement of her dower, held a waiver of her dower rights.—*Brown v. Brookhart*, Iowa, 124 N. W. 882.

46. Druggists—Sale of Drugs.—The legislature's police power to conserve the public health includes the right to regulate and restrict the sale of drugs and medicines, whether poisonous or not.—*State Board of Pharmacy v. Matthews*, N. Y., 90 N. E. 966.

47. Easements—Creation.—An assignable and inheritable right to use for profit the land of another may be created by a deed, and need not be reserved as appurtenant to other property.—*Baker v. Kenney*, Iowa, 124 N. W. 901.

48. Elections—Contest.—The statutory mode of contesting elections is a special proceeding, and the powers of the court in which the proceeding is brought, as well as the mode of procedure, must be determined by the statute alone.—*Bradburn v. Wasco County*, Or., 106 Pac. 1018.

49. Eminent Domain—Compensation.—In proceedings by a city to condemn land for a street, the jury in determining whether any adjacent property is damaged held required to determine whether or not the remaining property is benefited.—*City of Tacoma v. Wetherby*, Wash., 124 N. W. 903.

50.—Measure of Compensation.—The measure of compensation for land taken for public use should be the same without reference to the purpose for which the property is taken.—*Broadway Coal Mining Co. v. Smith*, Ky., 125 S. W. 157.

51. Equity—Laches.—Where a person deposited money with another, to be repaid on actual demand, the owner was not chargeable with unreasonable delay in failing to demand payment before the other's death, which occurred 23 years after the deposit was made.—*In re Fallon's estate*, Minn., 124 N. W. 994.

52.—Protection Against Fraud.—Equity protects against fraud in all forms, but takes notice only of the basic wrongs accomplished through manipulations concealment and fraud, made possible by the disparity between the parties as to information, intelligence and confidence, inspired by previous dealings and associations.—*Yuster v. Keefe*, Ind., 90 N. E. 920.

53. Estoppel—Pleading.—An estoppel arises from facts pleaded, though no fact is designated as such.—*Carter v. Rinker*, U. S. C. C., D. Kansas, 174 Fed. 882.

54. **Evidence—Judicial Notice.**—The court takes judicial notice that all men do not possess the same judgment as to distance.—George v. St. Louis & S. F. R. Co., Mo., 125 S. W. 196.

55.—**Parol Evidence**—Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, parol evidence tending to vary it is admissible.—Heisler Pumping Engine Co. v. Baum, Neb., 124 N. W. 916.

56. **Execution—Persons Entitled.**—One of several joint judgment debtors, who has paid the debt and taken an assignment of the judgment, cannot collect it from his co-debtors by execution.—Johnson v. Sherrod, Mo., 125 S. W. 212.

57. **Federal Courts—Appellate Jurisdiction.**—The appellate jurisdiction of the federal Supreme Court over state court cannot be based on denial of federal right not urged in the trial court, nor called to attention of state appellate court.—Cincinnati, N. O. & T. P. Ry. Co. v. Slade, U. S. S. C., 30 Sup. Ct. 236.

58.—**Jurisdiction.**—In a transitory action in a federal court, as for a tort, the jurisdiction of the court is not affected by the fact that the cause of action arose in another state of which plaintiff is a citizen.—Lake Shore & M. S. Ry. Co. v. Eder, U. S. C. of App., Sixth Circuit, 174 Fed. 944.

59. **Frauds, Statute of—Debt of Another.**—An agreement of a purchaser of land to assume an incumbrance thereon is an agreement to answer for the debt of another within the statute of frauds, and is not valid unless in writing.—Parsons v. Kelso, Mo., 125 S. W. 227.

60.—**License to Cut and Take Timber.**—A license to cut and take from land within a specified time standing timber may be proved by parol, since such license conveys no interest in the land.—Baker v. Kenney, Iowa, 124 N. W. 901.

61.—**Part Performance.**—Where rent is paid in advance for the whole period of the lease, though more than a year, the lessee cannot be ejected until the expiration of the term, because the lease does not conform to the statute of frauds.—Koschnitzky v. Hammond Lumber Co., Wash., 106 Pac. 900.

62. **Good Will—Transfer.**—The transfer of the good will of a business need not be under seal.—Myott v. Greer, Mass., 90 N. E. 895.

63. **Homestead—Deed by Husband.**—A husband's deed to the homestead, in which the wife does not join, conveys the title as against every one but the wife and those claiming under her.—Pullman v. City of Houston, Tex., 125 S. W. 69.

64. **Husband and Wife—Contracts.**—A wife executing a deed of land within the time required by the contract, signed by the husband alone, held to ratify the contract.—Heinemann v. Sullivan, Wash., 106 Pac. 911.

65.—**Wife's Separate Estate.**—A judgment for the wife, on granting her a divorce, for a specified amount as a division of the property, is her separate estate.—Kistler v. Kistler, Wis., 124 N. W. 1028.

66. **Indians—Tribal Lands.**—The United States retained the same power over land used for an Indian burying ground, excepted in Wyandotte Treaty Jan. 31, 1855, art. 2, from the cession of the lands of the tribe that it would have had if the tribe had continued in existence after the treaty.—Conley v. Garfield, U. S. S. C., 30 Sup. Ct. 224.

67. **Interest—Money Payable on Demand.**—Where a person deposited with her brother money, to be used by him for an indefinite time and to be paid upon demand, she was entitled to interest thereon.—In re Fallon's Estate, Minn., 124 N. W. 994.

68. **Interstate Commerce—Shipping Liquor Into State for Personal Use.**—A law prohibiting the shipping of intoxicating liquors lawfully purchased in another state into the state for the use of the purchaser for family held an interference with interstate commerce.—Alexander v. State, Okl., 106 Pac. 988.

69. **Intoxicating Liquors—Local Option District.**—It is not a violation of the local option law to go from a dry county into a wet county and purchase liquor, and bring it into the dry county for use as a beverage.—State v. Lynch, 90 N. E. 935.

70.—**License Tax.**—Act Feb. 12, 1907 (Acts 1907, c. 4), imposing an occupation tax on persons handling liquors C. O. D., is valid as a police regulation of the handling of intoxicating liquors.—L. Craddock & Co. v. Wells-Fargo Company Express, Tex., 125 S. W. 59.

71.—**Necessity for License.**—As the state cannot surrender its police power, the issue of a corporate charter to a brewing company by the states does not authorize an unrestricted sale of its beer within the state.—Skelton v. State, Ind., 90 N. E. 897.

72.—**Prescription by Physician.**—A physician who was the owner of a drug store and a pharmacist, when charged with an illegal sale of liquor, cannot shield himself behind a sham prescription fraudulently fabricated for that purpose.—State v. Robertson, Mo., 125 S. W. 215.

73. **Judgment—Full Faith and Credit.**—The provision requiring full faith and credit to be given to the judicial proceedings of other states does not prevent injury into the jurisdiction of the court rendering a foreign judgment sued on.—Davis v. Davis, U. S. C. C. of App., Fourth Circuit, 174 Fed. 786.

74.—**Opening or Vacating.**—An attorney held under a legal and moral obligation to serve his client, and is under no obligation to the adverse party seeking by letter to employ him.—Weller v. Studebaker Bros. Mfg. Co., Ark., 125 S. W. 129.

75.—**Scire Facias.**—The writ of scire facias to revive a judgment at common law is not a new action, but a continuation of the old one.—Davis v. Davis, U. S. C. C. of App., Fourth Circuit, 174 Fed. 786.

76. **Larceny—Lost Property.**—A finder is not guilty of larceny of lost goods unless he has a felonious intent to appropriate them when found.—Brewer v. State, Ark., 125 S. W. 127.

77. **Libel and Slander—Character.**—Defendant in libel may, in defense and in mitigation of damages, prove plaintiff's bad character.—Lydiard v. Daily News Co. of Minneapolis, Minn., 124 N. W. 985.

78.—**Publication by Agent.**—Where a publication by an agent was not libelous, a ratification by the principal, did not make it so.—Harris v. Santa Fe Townsite Co., Tex., 125 S. W. 77.

79. **Life Estate—Adverse Estate.**—The possession of a life tenant is not adverse to the interest of the remainderman or reversioner.—Jacobs v. All Persons, etc., Cal., 106 Pac. 896.

80. **Limitation of Actions—Flooding Lands.**—Cause of action for injury to crops by railroad

embankment arises from the date of the injury, not from the date of the construction of the embankment.—*Reed v. Chicago, B. & Q. R. Co.*, Neb., 124 N. W. 917.

81.—**Persons Who May Rely on Limitations.**—A gas company which was given the unclaimed balance of a fund impounded by the court, and which was to be returned to the consumers who paid it on condition that any claimants who afterward appeared should be paid their share, held not entitled to invoke the statute of limitations against their claims.—*Northern Union Gas Co. v. Mayer*, U. S. C. C. of App., Second Circuit, 174 Fed. 817.

82. **Master and Servant—Assumed Risk.**—An employee cannot be held to have assumed the risk of injury from a danger of which he did not know, while the master did, and which was not obvious.—*Duluth Elevator Co. v. Wallin*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 955.

83.—**Contributory Negligence.**—The rule that where there are two ways of performing a dangerous duty it is the servant's duty to select the least dangerous one is subject to the exception that, if the conditions are such that the safer way cannot be used, the law permits the selection of the more dangerous one.—*George v St Louis & S. F. R. Co.*, Mo., 125 S. W. 196.

84.—**Defective Appliances.**—An employer's promise to repair a defective appliance need not be in express words, but may be implied from the words spoken or the employer's subsequent conduct.—*Alkire v. Myers Lumber Co.*, Wash., 106 Pac. 915.

85. **Mortgages—Deed as Mortgage.**—In an action to have a deed declared a mortgage, where plaintiff was in possession, laches could not be imputed to him as long as it was not sought to interfere with his possession.—*Brown v. Spradlin*, Ky., 125 S. W. 150.

86. **Municipal Corporations—Automobile Accidents.**—Where an automobile and a person driving a team approach each other on a city street, both are bound to exercise ordinary care to avoid an accident or collision.—*Webb v. Moore*, Ky., 125 S. W. 152.

87.—**Obstructions in Street.**—If a city intrusts to a street contractor or subcontractor the duty to protect the public by barriers or otherwise against a temporary obstruction in the street, it becomes liable for their failure as it would be for its own.—*Stoliker v City of Boston*, Mass., 90 N. E. 927.

88.—**Powers.**—A municipal corporation has only such powers as are expressly granted, or fairly or necessarily implied from those granted, such as are essential, and not merely convenient, to the declared objects of the incorporation.—*Brooks v. Incorporated Town of Brooklyn*, Iowa, 124 N. W. 868.

89.—**Validity of Incorporation.**—The incorporation of a village is not invalidated because land used for agricultural purposes, without blocks or streets, was improperly included.—*Stout v. St. Louis, I. M. & S. Ry. Co.*, Mo., 125 S. W. 239.

90. **Names—Change of Name.**—At common law a person may change his name in good faith by merely adopting a new name, and holding himself out to his friends thereunder with their recognition.—*Smith v. United States Casualty Co.*, N. Y., 90 N. E. 947.

91. **Navigable Waters—Non-Tidal Stream.**—A non-tidal stream, which was not meandered

in the survey by the United States in 1823, is *prima facie* a non-navigable stream.—*Blackman v. Mauldin*, Ala., 51 So. 23.

92. **Negligence—Automobiles.**—An automobile is not such a dangerous machine as would require it to be put in the category with the locomotive, ferocious animals, dynamite, and other dangerous contrivances as respects the owner's liability for injuries therefrom.—*Steffen v. McNaughton*, Wis., 124 N. W. 1016.

93.—**Want of Ordinary Care.**—Want of ordinary care is negligence, but want of extraordinary care, or that which is customarily exercised by extraordinarily careful people, is slight negligence, and the latter does not affect the rights of parties injured.—*Hackett v. Wisconsin Cent. Ry. Co.*, Wis., 124 N. W. 1018.

94. **Notice—Mailing of Letter.**—Proof of the mailing of a letter addressed to a firm and directed generally to "St. Louis, Missouri," containing no specific address or statement of the firm's business, is not sufficient to charge the firm with notice of its contents against their denial of any knowledge of it.—*Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 923.

95. **Parties—Plaintiffs.**—Under common law procedure, where one of several owners of a joint interest refused to join as plaintiff, the other owners were permitted to use his name as a co-plaintiff.—*Ingham Lumber Co. v. Ingersoll & Co.*, Ark., 125 S. W. 139.

96. **Partition—Personal Property.**—A co-tenant of personal property may have it partitioned, and such right is not subject to the control of another co-tenant.—*Julian v. Yeoman*, Okl., 106 Pac. 956.

97. **Payment—Recovery of Money Paid.**—Money paid under a mistake of fact may ordinarily be recovered back; the law, under such circumstances, raising an implied promise to refund.—*James River Nat. Bank of Jamestown v. Weber*, N. D., 124 N. W. 952.

98. **Plaintiff—Separate Statement of Causes of Action.**—Where plaintiff had three separate causes of action, and failed to state them separately, as required by Rev. Codes, sec. 6533, the proper remedy was to move to make the complaint more definite and certain.—*Galvin v. O'Gorman*, Mont., 106 Pac. 887.

99. **Principal and Agent—Authority of Agent.**—An agent to collect has no authority to receive anything but money, nor can he compound a debt or commute it for his own debt.—*Zang v. Hubbard Building & Realty Co.*, Tex., 125 S. W. 85.

100.—**Implied Authority.**—A general agent for buying cotton held not to have implied authority to open an account in a bank in the name of his principals, where it was not necessary to his business of buying cotton.—*Chicago, R. I. & P. Ry. Co. v. Chickasha Nat. Bank*, U. S. C. C. of App., Eighth Circuit, 174 Fed. 923.

101. **Principal and Surety—Discharge of Surety.**—A surety guaranteeing the payment of rent held discharged from liability for the failure of the landlord to comply with the lease.—*Berman v. Shelby*, Ark., 125 S. W. 124.

102.—**Discharge of Surety.**—A surety is discharged by a valid agreement made without his consent, varying the original contract in any material particular, whether the change be to his benefit or prejudice.—*Zang v. Hubbard Building & Realty Co.*, Tex., 125 S. W. 85.

103. **Railroads—Injury to Person on Track.**—

Where the engineer of the train exercised ordinary care to discover plaintiff while lying on the track, but failed to see him in time to avoid injury, the railroad company would not be responsible, though plaintiff was free from contributory negligence by reason of his want of mental capacity to appreciate his danger and avoid the same.—*Epperson v. International & G. N. R. Co.*, Tex., 125 S. W. 117.

104.—**Look and Listen.**—If a traveler at a crossing fails to look and listen without a reasonable excuse, and such failure contributes to his injury, he cannot recover.—*Crabtree v. Missouri Pac. R. Co.*, Neb., 124 N. W. 932.

105. **Removal of Causes—Diversity of Citizenship.**—An action of trespass to try title brought under the statutes of Texas, in which as permitted by Rev. St. Tex. 1895, art. 5255, several defendants each claiming title to the same tract are joined and answer, setting up their several claims, some of whom are citizens of the same state as plaintiff, is not removable by a non-resident defendant as involving a separable controversy between citizens of different states.—*Lomax v. Foster Lumber Co.*, U. S. C. C. of App., Fifth Circuit, 174 Fed. 959.

106. **Replevin—Articles on Person.**—Even if articles on the person of defendant cannot be taken from his person on a writ of replevin, action for the article can be maintained.—*Siebeck v. McTiernan*, Ark., 125 S. W. 136.

107.—**Demand.**—An owner held entitled to replevin animals without a demand where the one seizing them under the damage feasant statute (St. 1898, sec. 1631 et seq.) fails to give notice of application for appraisers.—*Goodrich v. Crabtree*, Wis., 124 N. W. 1023.

108.—**Pleading.**—Where plaintiff in replevin relied on general allegations of ownership and right of possession, a general denial puts in issue both the right of property and the right of possession.—*Hickey v. Breen*, Mont., 106 Pac. 881.

109. **Sales—Conditional Sales.**—Under a conditional sale, a third person cannot acquire any interest from the buyer, without the seller's consent until the vesting of the title in the buyer.—*Passow v. Emery*, Utah, 106 Pac. 935.

110.—**Severable Contracts.**—Where shingles were sold in car load lots, and the buyer accepted two car loads, but refused to accept the third, the contract as to the three cars was severable, and the seller could sue for the price of the third.—*Duluth Log Co. v. Hill Lumber Co.*, Minn., 124 N. W. 967.

111. **Specific Performance—Defective Title.**—A purchaser may be compelled to specifically perform his contract although at the date set for the transfer the title was defective, if the defect is subsequently remedied.—*Pakas v. Clarke*, 121 N. Y. Supp. 192.

112.—**Right of Principal to Enforce.**—A contract for the purchase of real estate, made through an agent in his own name, without stating the name of his principal, may be enforced by the principal in his own name.—*Mitchell v. Knudtson Land Co.*, N. D., 124 N. W. 946.

113. **Statutes—Effect of Repeal.**—By the implied repeal of a statute by a later statute on the same subject, all acts or omissions in violation of the former statute are pardoned, and the penalties incurred thereunder are no longer enforceable.—*State v. Texas & N. O. R. Co.*, Tex., 125 S. W. 58.

114. **Taxation—Wrongful Possession of Real Property.**—Property owners must pay taxes on their own property though it is in the wrongful possession of another.—*Itzel v. Winn*, Wis., 124 N. W. 1033.

115. **Trespass—Burning House.**—It does not matter as to liability of trespassers for burning an unoccupied house how careful they may have been in building a fire in the fireplace.—*Wetzel v. Satterwhite*, Tex., 125 S. W. 93.

116. **Trusts—Character of Transaction.**—The court will not assume that one person holds title to property in trust where the rights of the parties have been fixed by a specific written contract.—*Gasaway v. Ballin*, Wash., 106 Pac. 905.

117.—**Constructive Trusts.**—The element essential to create a constructive trust is that fraud, either actual or constructive, must have intervened, and such trusts are raised by courts of chancery only in cases where it becomes necessary to prevent a failure of justice, and in most cases the parties do not intend or agree to create such relation.—*Yuster v. Keefe*, Ind., 90 N. E. 920.

118. **Vendor and Purchaser—Estoppel to Deny.**—A vendor was not estopped to deny the execution of a contract to convey by the fact that she, after a suit had been started for specific performance tendered to the vendee a deed to the premises upon conditions different from those in the contract.—*Fritz v. Mills*, Cal., 106 Pac. 725.

119.—**Offer and Acceptance.**—An offer in specific terms, for the purchase of a tract of land made by letter or telegram, unconditionally accepted, becomes a binding contract.—*Mitchell v. Knudtson Land Co.*, N. D., 124 N. W. 946.

120.—**Trespass to Personality.**—Where the purchaser of timber knew that the vendor was only tenant by the curtesy so that he had no right to sell, the purchase of the timber, even when cut, made the purchaser a joint trespasser.—*Kentucky Stave Co. v. Page*, Ky., 125 S. W. 170.

121. **Waters and Water Courses—Damages.**—Damages paid to riparian owner for diversion of stream do not cover future injuries caused by defective construction of railroad embankment.—*Reed v. Chicago, B. & Q. R. Co.*, Neb., 124 N. W. 917.

122.—**Municipal Water Company.**—A water company, having failed to comply with its contract with a city to furnish water for fire protection, held not liable in tort for damages sustained by property owner whose property was destroyed by fire.—*German Alliance Ins. Co. v. Home Water Supply Co.*, U. S. C. C. of App., Fourth Circuit, 174 Fed. 764.

123. **Will—Construction.**—The presumption that testator intended to dispose of his entire estate does not authorize disposition by the court of property not in fact disposed of.—*Walters v. Neafus*, Ky., 125 S. W. 167.

124.—**Testamentary Instrument.**—The delivery of a will conveys no estate to a devisee named therein.—*Moody v. Macomber*, Mich., 124 N. W. 549.

125.—**Undue Influence.**—In the absence of undue influence or want of mental capacity, it is immaterial what induced testator to change his will, reducing a bequest to a relative.—*Haskins v. Stackhouse*, Ky., 125 S. W. 179.

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APPELLATE COURTS—A SUGGESTION.

Wheresoever there has been any demand for any change in the appellate systems prevailing in this country, the demand has been based upon the claim of delay, in disposition of appeals, working injustice. The people of no state have ever been asked to increase the number of judges upon any theory, that the highest court therein ought to have its attention occupied chiefly with what lawyers regard as the more serious and important questions of law, but because the judges thereof were so deluged with business, that delay in decision wrought injustice.

When this need has been brought home to the people, lawyers have elaborated plans for different kinds of appellate courts, classifying causes and questions and apportioning jurisdiction, while the prime thing the people were caring about was the giving of more judges to dispose promptly of the work the fewer, under the old system, were unable to perform.

These plans generally provided for appellate courts under the ultimate control of the older and higher tribunal, and the reports in whatsoever state they have been tried abound in evidence, that much labor, expense and time have been consumed in the disposition of questions arising purely out of the new system in vogue. These questions relate to jurisdiction of the new tribunals, and, to preserve harmony in decision, they carry causes for retrial in the courts of very last resort.

We may conceive, that it could be argued that, where the newer and lower tribunals are composed of smaller benches, less seri-

ous questions could be disposed of by them and time be saved to the larger bench. Also we think it might be urged that these lower courts could be so placed in districts as to make them more convenient. But after all, it would have to be conceded, that these are advantages, which experience has shown have their offset in the circumstances we have above indicated.

But there is another evil besides those we have mentioned, and that is that this system of lesser appellate courts is the most prolific source of opinion writing, which exists in this country. We instanced in 69 Cent. L. J. 217, how this pertained to what seemed to us the impracticable organization of the federal circuit courts of appeals. But the merely personal, and not strictly judicial, attitude is but more accentuated in benches in those courts than in subordinate appellate courts in the states.

Whenever an appellate court is unable to lay down a precedent for its own guidance and to which the people, who gave it a commission to act, may conform themselves in their conduct and contracts, it is but an expedient for arbitrating disputes between two or more litigants. It lays down no rules by which anybody, even itself, is bound, and its decisions are like those of the Roman thumb for contests in the arena.

Therefore, for every case one of these tribunals disposes of, its subordinate position makes its reasons for its conclusion the more demandable and the less important. If it could speak with the authority of precedent, it would be derogating from its own dignity to be restating, in frequency, its reasons for its holdings.

Let us suppose there are two or more of these lower appellate tribunals in a state. If each can establish no precedent for itself, it certainly can not do this for another. Then, if questions arise again and again, repetitions proceed in a kind of

arithmetical ratio, each judge, prone to opinion writing, is spurred to a sense of duty to rescue his particular view from the maelstrom of language in which it has been engulfed.

Wherefore, as delay is the only substantial reason for any change in the appellate system in any state, the practical question to ask is how may this be best accomplished? Is there any better way of doing this than by the creation of assistant courts, burdened with such defects and disadvantages as we have indicated?

To our mind a committee appointed by the Missouri State Bar Association, which has been considering the appellate system of that state, has formulated a plan, which will answer the objections we have urged against, and give every benefit claimed for, the intermediate or subsidiary appellate court system. This plan is to have, for that state, the same number of judges now constituting its entire appellate system made justices of one supreme court, sixteen in number, with authority to hear causes in division. Each division is to be composed of three justices, with the chief justice not sitting in either. These divisions are to sit, respectively in districts, and the only test of jurisdiction, in an appealable cause, is the venue in the court appealed from. The chief justice and the five presiding justices in divisions are to constitute a central division, which is to be a kind of court *en banc*, and by authority, given to this central division, conflict in decision in division is to be eliminated.

Further details need not be here given. The proposition seems simple, and were it possessed of some complication, it would yet seem that a court, given authority to make and perfect rules for its own guidance, in the achieving of practical results, ought to be able to do this, or its judges confess themselves unfit for the places they hold.

If it were a practical body, would its members be called on to discuss such questions as whether the court has jurisdiction to decide a particular appeal? Or what to do with a case when a conclusion has been reached? Or to repeat its reasoning when a particular principle has once been decided? Or to do any of the many things subordinate appellate courts or the members thereof feel themselves bound to do, over and again, because they speak conclusively about nothing? The speech of authority has been called laconic, and something laconic, in the way of judicial opinions, is getting to be a very sore need in this country.

For the benefit of our brethren outside of Missouri, it may be well to say that in that state there are two divisions of its supreme court; which also sits *en banc* in cases transferred from either division, and there are three courts of appeals, with a defined part of the jurisdiction formerly resting in the supreme court. It is perceived, therefore, that Missouri has tried both systems. If its bar should recommend the adoption of the committee's plan, it might not be unfairly assumed that they speak as those who have learned a lesson from experience.

We have heard of some objection to this plan, upon the ground that the arrangement offers opportunity for political manipulation, but that such a plan would fail to produce a court competent, if honestly managed, to produce what it would be intended to accomplish, seems not to be denied.

It is impossible to answer any objector of this kind satisfactorily. His reflections are of the chameleon kind—colored by an interior ray which defies the force of external facts. If the highest court in a state cannot be vested with some measure of discretion, you put it in a strait-jacket, detracting from its dignity and fettering its usefulness.

NOTES OF IMPORTANT DECISIONS:

STATUTE OF FRAUDS—CONTRACT FOR WORK AND LABOR, OR OF SALE.—The Michigan Supreme Court follows the liberal rule in avoidance of the statute of frauds to denominate a contract to supply a specific article to be manufactured that is unsuited for general trade, a contract for work and labor, and not a contract of sale. *Bauscher Bros., Ltd., v. Giles Estate*, 125 S. W. 420.

This is, according to the decided weight of authority, the prime test seeming to be that but for the contract a particular manufacture would not be made, coupled with the fact that being made it is unsuited for the general trade.

Thus the agreement in this case was one for the manufacture of certain dishes with the monogram of a proposed purchaser thereon, which being manufactured are to be sold to him and devoted to his special use.

There is some refinement in applying the rule of work and labor, which is shown by the following from the elaborate opinion in the case:

"The interpretation of the statutory words 'contract for the sale of goods,' etc., has led to the adoption of various rules in different jurisdictions whereby to distinguish contracts for sale from contracts for manufacture. By what may be termed the Massachusetts rule an agreement by one to construct an article, especially for or according to the plans of another, whether at an agreed price or not, although the transaction is to result in a sale of the article, is a contract for work and labor, and not within the statute. The prevailing view throughout the United States accords substantially with the Massachusetts rule. According to what may be termed the New York rule, where the substance of the contract is work and labor to be done in converting raw materials into a new and totally different article, although the transaction is to result in a sale, the contract is not within the statute, but if at the time of the agreement the article sold substantially exists in its ultimate form, or is to be procured in substantially its ultimate form from others, even though acts remain to be done in finishing it, the agreement is a contract for sale, and within the statute. Certain states have construed the statute by reference to the English cases, or by adopting portions of the

Massachusetts or New York rules, without adhering exclusively to either. Among such states are Alabama, Minnesota, New Jersey, Oregon, and Wisconsin. Some jurisdictions adopt the rule that, where the contract primarily contemplates work and labor to be done upon the goods to be sold, so as to make work and labor the essential consideration, the contract is not within the statute. Of these states are Missouri, New Hampshire, South Carolina, Washington and Wyoming. ²⁰ Cyc. 241 et seq., and cases cited."

This is a very instructive case, reviewing the authorities quite thoroughly.

COVENANT OF WARRANTY—EXPENSE OF SUCCESSFUL DEFENSE BY GRANTEE AGAINST LEGAL TITLE FOR EQUITABLE REASONS UNENFORCEABLE.—The case of *Smith v. Keeley*, 125 N. W. 669, decided by Supreme Court of Iowa, points out a distinction in the liability of a warranty of title for reasonable expense incurred by grantee in successfully defending against the assertion of a paramount title hostile to that purported to be conveyed.

After premising that it is well settled that if the asserted hostile title is that of a legal title, and it is shown not to exist, no recovery can be had for expense in defeating same, the opinion then says: "On the other hand, it is well settled that if the hostile title asserted is a legal title in fact outstanding, but for equitable reasons not enforceable against the grantee, he may maintain an action in equity, to quiet the title as against such hostile claim, or, when it is asserted against him, interpose an equitable defense thereto, and although he is successful in thus defeating the outstanding legal title, he is nevertheless entitled to recover against his grantor the reasonable expense involved in quieting his title, or making his equitable defense to the hostile title." For each proposition there is citation of authority. For the latter, outside of Iowa, see cases of *Lane v. Fury*, 31 Oh. St. 574; *Pineland Mfg. Co. v. Guardian Trust Co.* (Mo. App.), 122 S. W. 1133, 2 Sutherland on Damages (2d Ed.), sec. 619.

The distinction involved in the two principles is but a recognition of what is a marketable title in specific performance suits under our recording acts.

Certainly a vendor ought not to be responsible for any unwarrantable assertion of what the record excludes, and, on the other hand, if the record admits of the intervention of a hostile legal title, dependent, we may say, on some fact aliunde the record, for example, vesting by descent or statutory rule in admin-

istration of a decedent's estate, there is a *prima facie* breach of the warranty, which the covenantor should make good.

There is nothing decided about the duty of the grantee to notify grantor if suit is brought against him, as this was done in the principal case. It seems to be considered, however, that he ought to be notified, though we do not believe this is required as to the bringing of a suit to quiet title.

CARRIER—CONFISCATORY RATES AND CONCLUSION OF STATE COURT IN RESPECT THEREOF.—The case of Northern Pac. R. Co. v. North Dakota, 30 Sup. Ct. 423, shows an affirmation of the trial and supreme courts of a state adverse to the claim of a railroad that maximum rates were confiscatory. The following from the opinion by Mr. Justice Holmes shows a deferential consideration of a finding upon facts by the state court that deserves to be remembered as an exemplary ingredient of the comity to be cultivated between those courts which take a casual hand in determining private right and those that are the appropriate jurisdiction thereof.

The opinion speaks of the contention made that carriage of coal would entail a loss, and expert opinion that the statutory rates were unreasonable and then it is said: "But laying technical objections on one side and taking the facts as admitted, the argument for the state showed that there are too many elements of uncertainty in the calculation for us to say, if we could, as to which we intimate no opinion, that the conclusion (in favor of the carrier) is proved, when the supreme court of the state says that it is not."

It appears here, that the federal supreme court will defer the state conclusion, when the only claim of a federal right depends upon a question of fact, if the existence of that right is doubtful. Whether in its final analysis this as a practice is strictly logical, we will not undertake to say. At least our highest court does not appear to consider itself called upon as strictly bound in these claims about confiscatory rates to spell out a conclusion where the proof to establish a claim leaves the matter in doubt, if the local courts have fairly passed on the question.

The court follows as a precedent the ruling in Wilcox v. Consolidated Gas Co., 212 U. S. 19, and affirmed the decree, "but without prejudice to the right of the railroad company to reopen the case by appropriate proceedings if, after adequate trial, it thinks it can prove the confiscatory character of the rates for coal." In connection with the deference above referred to, we call attention to our discussion

¹ 68 Cent. L. J. 441, and 69 Cent. L. J. 37.

EFFECT OF OVERRULING OPINION OF COURT OF LAST RESORT ON RIGHTS ACQUIRED ON OPINION OVERRULED.

From Blackstone, we learned that when one decision overrules another it simply declares what always was the law from the beginning; that it does not make any new law, and that the people were always supposed to know that that had been the law from the beginning. In Allen v. Allen,¹ the court said that "Although the ablest courts in the land find great difficulty in determining what the law is, every one is conclusively presumed to know the law."

Whether that rule is applicable in the United States presents an interesting subject. In England they had one court of supreme authority, making the rule somewhat easier of application than it would be in the United States where we started with thirteen states and now have forty-six, and, in addition to that, have a Federal Supreme Court whose rulings are supreme in a certain class of questions. Not only that, but these different state courts, in a way, concern all of us, since, while the states are sovereign, and separate jurisdictions, yet they are political divisions of one greater common country where people are doing business with each other across all state lines and bringing themselves in contact with the laws of the different states, and become interested in the courts and the decisions of the courts of all the states as if we were really citizens of each of those states. The difficulties, then, in this country, resulting from overruled decisions are forty-seven times what they were in England, assuming that our courts only overrule the same ratio of decisions that are overruled in England. Therefore, this question is a very much more serious and practical question in this country than it could have been in England.

The constitutional limitations upon legislative action in this country, not found in England, have laid the foundation for the

¹ 30 Pac. (Col.) 215 and 216.

limitations being placed upon the courts in this country.

Having provided in the federal constitution that no state legislature could pass an act impairing the obligation of a contract, it would necessarily educate the conscience, in the course of time, to believe that a contract made in reliance upon a decision of a court of last resort ought to secure some rights and should not be subject to be stricken down by an overruling decision. It early became a question in the federal courts whether the contract impairment provision of the constitution extends to decisions also as well as acts of the legislature.

This question seems first to have arisen in an indefinite way, in 1847, in a decision written by Chief Justice Taney in the case of *Rowan v. Runnels*,² where he declared that a contract that had been made in reliance upon a decision of the Supreme Court of the United States, construing statutory and constitutional provisions of the state of Mississippi, which the Supreme Court of Mississippi, when the question finally came before it, refused to follow, should be protected and enforced notwithstanding the subsequent decision of the supreme court of the state on a question which was a local question of construction of their constitution and statutes. The question came up again in the case of *Ohio Life Insurance & Trust Company v. Debolt*,³ where the opinion was again rendered by Chief Justice Taney and his announcement, by reason of the former announcement which he had made, was very full and clear, apparently to the satisfaction of the entire court—that the effect of an overruling decision upon a contract would be the same under the provisions of the constitution as the effect of an act of the legislature, and that the constitution extended in its provisions equally to an overruling decision as it did to an act of a legislature impairing the obligation of contracts.

After this announcement similar announcements continued to be made in de-

cisions of the United States Supreme Court running along through a number of years, coming down to 1864 when the case of *Gelpcke v. Dubuque*,⁴ went up from the United States Circuit Court in Iowa, and was decided January 11, 1864, after apparently very elaborate argument. The majority opinion was written by Justice Swayne. Justice Miller dissented in one of the most vigorous opinions he has written. The majority opinion sustained the announcement which had been made by Chief Justice Taney in the two preceding cases, and elaborated and confirmed the announcement. After that case the doctrine continued to be announced right along from time to time in the same way.⁵ In those different cases almost every member of the court wrote opinions from time to time, so that it received the approval, expressly, of substantially all of them,—Chief Justice Waite writing one, in the case of *Douglas v. Pike County*,⁶ where he went extensively into the question again, and Justice Field wrote another, in the case of *Louisiana v. Pilslbury*,⁷ where he took an interest in elaborating the questions and stated it in strong and vigorous terms.

Strange as it would seem, this doctrine as to the protection extended by the provision of the Constitution to contracts made in reliance on decisions subsequently overruled, came up, nevertheless, later on and was absolutely overruled, in the case of the *Central Land Company v. Laidley*,⁸ where the doctrine is discussed again and denied in a majority opinion written by Justice Gray distinguishing the prior cases. Justice Field, who had written perhaps, the most recent of the opinions holding the other way, dissented. All prior cases had, as it so happened, gone up from the lower federal courts to the United States Supreme Court,

(4) 1 Wall. 175.

(5) *Havemeyer v. Bd. Suprs.*, 3 Wall. 295; *Mitchell v. City of Burlington*, 4 Wall. 270; *County of Lee v. Rodgers*, 7 Wall. 181; *City of Chicago v. Sheldon*, 9 Wall. 50; *Olcott v. Bd. Suprs.*, 16 Wall. 678; *Bd. Comrs. v. Thayer*, 4 Otto 631.

(6) 101 U. S. 677.

(7) 105 U. S. 278.

(8) 159 U. S. 103.

whereas this particular case was attempted to be brought up on error from a state supreme court which must involve a federal question in order to entitle it to a hearing. While it was very strongly and clearly stated, from time to time, and repeatedly in the prior opinions, that they were based on federal questions and that the overruling decision was an impairment of contract based on a prior decision within the meaning of the constitution, yet, in those same opinions, the question was also discussed on general principles of justice, and the court took advantage of that in the case of the Central Land Company v. Laidley, to say that all those prior decisions were based upon principles of general law and not on a federal question and that they did not involve, necessarily, a federal question because they came up from a lower federal court and did not necessitate a federal question as to impairment of contract, but that in this case of Central Land Company v. Laidley, the writ to a state supreme court could not be sustained, because there was no federal question involved in the question of the rights of one who had made a contract in reliance upon a decision which was subsequently overruled.

After that announcement the decisions ran along in that line, and in many cases until the case of City of Los Angeles v. Los Angeles Water Company.⁹ That was a case, however, that went up from a circuit court so that the real question could not be presented, strictly speaking, but in the opinion written by Justice McKenna it is apparent from the language and the class of authorities cited that the mind of the court was changing upon the question; that, while the announcement there could not be any more than dictum, none of the Justices there seemed to care to take up the opposite side of the question, since the question was not really involved in the record.

This conception that the mind of the court was changing is confirmed in the case of Muhlker v. New York & Harlem Rail-

road Company.¹⁰ It was decided at the October term, 1904, and the writ of error was there sued out upon the ground that the decision of the Court of Appeals of New York overruling a prior decision violated the constitution in that it impaired the obligations of a contract which a party had made relying upon an earlier decision of the Court of Appeals of New York. That case brought the question right before the court again, and an opinion is there rendered of very great moment, the majority opinion being written by Justice McKenna, who had indicated five years before, that probably the court's opinion was changing upon this question, and this majority opinion declared an entire change and sustained the writ of error from the Supreme Court of the State of New York. Justice Holmes wrote a dissenting opinion concurred in by the Chief Justice and Justices White and Peckham. Justice Holmes, in his dissenting opinion, states that not only had the majority opinion reversed a long line of decisions with reference to the impairment of contracts by subsequent judicial decisions, but that, in addition, they had gone much farther and declared that rights other than those *ex contractu* were entitled to protection from overruling decisions and would justify writs directed to the courts of last resort of the various states, not mentioning under what provision of the constitution, but I presume under the due process provision of the Fourteenth amendment.

This question came up again on another writ or error in Sauer v. City of New York,¹¹ from the same court, and while the writ was not sustained, yet in an opinion by Justice Moody, the doctrine of the Muhlker case was clearly reaffirmed, indicating that the court will sustain a writ of error sued out in a proper case of that kind.

These two last cases may be more important in their collateral effect upon a question not expressly discussed than with reference to the questions expressly con-

(9) 177 U. S. 558; 20 Sup. Ct. Rep. 736.

(10) 197 U. S. 544.

(11) 206 U. S. 536; 27 Sup. Ct. Rep. 686.

sidered. They hold that a decision of a state court is a "law" within the meaning of the word in sec. 10, art. I, constitution, though it has been uniformly held since Swift v. Tyson¹² that "law" as used in 34th Sec., Judiciary Act, 1789, includes some but not all decisions of the courts. Justice Field's able dissent from this holding in Swift v. Tyson, in B. & O. R. R. v. Baugh,¹³ anticipated and supported in Hare on Constitutional Law, now derives support from the Mulker case.

That outlines the course of the supreme court briefly upon this question and we find that, for a great many years, according to its holding in Central Land Company v. Laidley and other cases the supreme court was protecting rights inhering in contract from the effect of overruling decisions, on general principles of law, not related to the provisions of the constitution. That being the case, we have eminent authority in a long line of cases to the effect that an overruling decision is not, in all cases a declaration of what the law always was. It is so, as to people who have not acquired rights in reliance upon the decision overruled, but as to people who have acquired rights in reliance upon a decision overruled, there is a long line of federal authorities to the effect that they are entitled to protection. This establishes an exception to the rule declared in Blackstone. Some discussions, I notice, have proceeded upon the basis that the doctrine of protection against overruling decisions reverses the principles announced by Blackstone. Such is not wholly true, nor true at all, except as to persons who have acquired some vested right relying on the decision rendered.

Whether protection will extend farther than rights inhering in contract is not clear in the authorities, but it would be hard to understand why one right would occupy a different position from any other in that regard. If a man were to build a structure in accordance with a decision of his highest court, and that structure was properly

built, it would be hard to understand why he should not be entitled to as much protection in regard to negligent construction, as a party who had acquired some right, in reliance upon a decision inhering in contract. Justice Miller, in his dissenting opinion in the case of Gelpcke v. Dubuque, maintains that very clearly and argued against the majority opinion because it extended the doctrine only to rights *ex contractu*, contending there was no reason or policy, why, if a right inherent in contract was entitled to protection, any other right should not be entitled to the same protection.

Going now, into the state courts, there are several where protection is given against overruling decisions, and these courts protect rights whether inhering in contract or not.¹⁴

The Supreme Court of Indiana overruled a decision construing language in a will, as to whether it created a life estate or fee simple absolute, and they protected purchasers relying on the decision overruled. In Alabama they have applied it to the power of a married woman to execute a mortgage. In North Carolina they applied it to the right of defense in criminal cases, declaring that a man had a right to defend according to decisions of the supreme court at the time the alleged crime was committed and that while the overruling decision would be applicable as to all crimes committed after the decision was made, it would not be applicable as to crimes committed intervening between its announcement and the announcement of the prior decision.

(14) State v. Comptoir Nat'l D'Escompte De Paris, 51 La. Ann. 1, 26 So. 91; Vt. & Canada R. Co. v. Vt. Cent. R. Co., 63 Vt. 1, 21 Atl. 262, 10 L. R. A. 562; Farrier v. N. E. Mtge. Sec Co., 92 Ala. 176, 9 So. 532; Jones v. Woodstock Iron Co., 95 Ala. 551, 10 So. 635; Haskett v. Maxey, 134 Ind. 182, 33 N. E. 358; Center School Twp. v. Bd School Com'rs, 150 Ind. 168, 49 N. E. 961; Smith v. County of Clark, 54 Mo. 58; St. L. O. H. & C. Ry. Co. v. Fowler, 142 Mo. 670, 44 S. W. 771; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161; Whalley v. Galliard, 21 S. Car. 560; Yazoo & M. V. R. Co. v. Adams, 81 Miss. 90, 32 So. 937; Hall v. Wells, 54 Miss. 289; Bradley-Courrier Co. v. Lall, 10 Misc. 366, 31 N. Y. Supp. 120; Hill v. Brown, 144 N. C. 177, 56 S. E. 693; State v. Bell, 136 N. C. 674, 49 S. E. 163; George W. Sheppard, 2 Land Dec. 154.

(12) 16 Peters 1.

13) 149 U. S. 371; 13 Sup. Ct. Rep. 915.

The writer happens to know of an interesting application of this doctrine by the Attorney General of the United States in certain criminal cases. It became a question there whether the treaty with the Nez Perce Indians allowed the selling of liquor on that reservation. A case involving that went to the court of appeals of the Ninth Circuit and that court held that liquor could be sold there and, under that decision, a great many men took out licenses over that reservation and engaged in business pending the review of the case before the supreme court. It was a long time before the supreme court reversed the decision of the court of appeals, holding that there had been no right to sell liquor on the reservation at all.¹⁵ After that decision of the supreme court the Attorney General instructed the United States attorney in Idaho not to prosecute the men who had taken out their licenses after the decision of the court of appeals, and who ceased business there after the announcement of the decision of the United States Supreme Court. This shows that the justice of this principle influences lawyers generally in their action.

The case of City of Corvallis v. Stock,¹⁶ protects a lawyer or, rather, his client in the procedure which the lawyer had taken relying upon a decision which the court afterwards overruled, the procedure having been entered upon before the overruling of the decision. This question came up before the Court of Appeals of West Virginia in Harbert v. Monongahela River R. Co.¹⁷ and Falconer v. Simmons,¹⁸ where though they refused to approve the Oregon case, yet they protected the lawyer by sustaining the procedure which he adopted although apparently disapproving it. They theoretically condemned but practically adopted the Oregon rule. This rule has been applied in questions of procedure and in questions of criminal law and in ques-

tions of property rights generally, as well as questions of contract. The overruling decisions in this country makes the question one of great moment.

There is quite a temptation for a state supreme court, since the doctrine is extended to them by the federal court, to now adopt the principle as a general principle of law as against the decisions of the federal supreme court. There is one decision, couched in some such sentiment as that, written by Chief Justice Ryan, of the Supreme Court of Wisconsin, in Drake v. Doyle,¹⁹ where an individual had made a contract in reliance upon some decision of the United States Supreme Court which was afterwards overruled. Chief Justice Ryan, referring to the case of Gelpcke v. Dubuque, declared that if the doctrine which the federal supreme court had been extending to overruling decisions of the state supreme courts was correct, it would certainly be very proper for the state supreme courts to extend the same protection to individuals who were suffering from overruling decisions of the federal supreme court.

What the effect of the general adoption of these principles would be becomes an interesting question. It seems that such a rule would diminish litigation. The main objection to overruling erroneous decisions has been that it would unsettle titles. Would not the new rule afford an opportunity of correcting admitted errors in the law without danger? The application of the rule will cause increased interest in the publication of decisions and raise important questions as to the date they become effective—as to which some regulation might be necessary. It might tend toward brevity and the elimination of *dictum* from opinions.

There is another application of this doctrine. Even if a court should refuse to protect rights acquired under decision that is overruled, as a general proposition of law, the same court might not refuse to dismiss a case brought to attack those rights in a case exclusively of equitable cog-

(15) *Dick v. U. S.*, 208 U. S. 340.

(15) *Dick v. U. S.*, 208 U. S. 340, 28 Sup. Ct. Rep. 399.

(16) 12 Ore. 391, 7 Pac. 524.

(17) 40 S. E. 377.

(18) 41 S. E. 193.

(19) 40 Wis. 175.

nizance. Especially might they refuse relief in a court of equity, to a litigant of a speculative character, one who acquired his rights for the purpose of litigation, after the overruling decision was rendered, with full knowledge that his antagonist whom he attacks had made his investment or incurred his liabilities in reliance upon the overruled decision. A court of equity might well protect one who has acquired rights relying upon the overruled decision as against one who did not acquire his rights with which to attack him, until after this overruling decision was rendered.²⁰

JAMES E. BABB.

Lewiston, Idaho.

(20) See State v. Comptoir, 51 La. Ann. 1, and Vt. & Con. R. Co. v. Vt. Cent. R. Co., 63 Vt. 1, *supra*.

GARNISHMENT—SET-OFF AND COUNTER CLAIM.

ARMITAGE HERCHEL CO. v. JACOB BARNETT AMUSEMENT CO.

Supreme Court of Minnesota, Jan. 14, 1910.

A bank, summoned as garnishee in an action against one of its depositors, may set off against the depositor's general account unmatured notes held by it at the time of the service of the garnishee summons, when it appears that the depositor is insolvent.

BROWN, J.: In June, 1908, the Armitage Herchel Company duly commenced an action against Jacob Barnett and the Jacob Barnett Amusement Company to recover the sum of \$1,000. At the commencement of the action garnishment proceedings were instituted against the Merchants' National Bank, respondent on this appeal. The garnishee summons was served on June 30, and the date for disclosure set for July 23, 1908. On that day the garnishee appeared and disclosed that on the date the summons was served defendants had on deposit with it, subject to check, the sum of \$1,138.99. At the same time, and

as a part of the disclosure, the garnishee asserted and claimed the right to set off against this deposit account the amount of two promissory notes, of \$500 each, which the bank then held against defendants, but which were not then due. One of the notes matured July 15, before the disclosure, and the other thereafter, on July 30, 1908. No actual application of the deposit account had at the time the summons was served been made towards the payment of the notes, nor entries to that effect been made on the books of the bank. At the time the garnishee summons was served both defendants were insolvent, but had not been formally so adjudged in bankruptcy or insolvency proceedings. On August 15, 1908, defendant Jacob Barnett was duly adjudged a bankrupt, and a like adjudication was made against the amusement company on September 1, 1908, and the intervenor herein was duly commissioned as trustee in bankruptcy for both. Judgment was rendered in the main action against the defendants on October 17, 1908, for the sum of \$1,014.45. The ten of the garnishment, having been acquired within four months from the time defendants were adjudged bankrupts, was, as to plaintiff, their trustee in the bankruptcy proceedings, an unlawful preference, and on the theory that it survived for the benefit of defendant's creditors, the intervenor, as trustee, was by order of the court made a party to the action for the purpose of enforcing it. Plaintiff took no further part in the action. After being so made a party, intervenor applied to the court below, upon the record and files in the cause, including the disclosure of the garnishee, for judgment against the garnishee for the amount of the judgment against defendants in the main action. At the hearing on this application, which was presented upon appropriate supplemental pleadings, the garnishee again insisted on its right to set off the amount of the promissory notes held by it against defendants' deposit account. The trial court sustained this right, denying intervenor's application for judgment, and the latter appealed from an order denying a new trial.

The only question presented is tersely stated by appellant, as follows: May a bank, summoned as garnishee in an action against

an insolvent depositor, brought by a creditor of the latter, set off against the general deposit impounded by the garnishment a note held by the bank against the depositor which was not due when the garnishee summons was served?

The equitable doctrine of set-off had its origin in a very early day, and has always been applied by courts of equity, either with or without statutory authority, in all cases of mutual demands, where the dictates of natural justice rendered it appropriate; no superior rights of third persons having intervened before suit. Waterman on Set-Off, sec. 17; Hawkins v. Freeman, 2 Eq. Cases Abr. 10; Jeffries v. Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158; Trust Co. v. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710. Insolvency of one of the mutual debtors is the foundation for this relief, to the exclusion of the demands of third persons, except in those cases where by special circumstances their rights are superior to those of the debtor invoking the remedy. "The natural equity," says Waterman on Set-Off, sec. 438, "to have mutual but unconnected demands between two parties who have been dealing with each other set off, is, as a general rule, superior to the claim of any creditor who has not dealt with the insolvent upon the faith of the specific fund against which the right of set-off is claimed." And this, it seems, is the generally accepted doctrine of a majority of the courts of this country and England. In this state the right is preserved by statute and made applicable to all cases of assignment of non-negotiable choses in action (Rev Laws 1905, sec. 4054), and has been applied without statutory sanction in insolvency proceedings. Stolve v. Bank, 67 Minn. 172, 69 N. W. 813.

Though the authorities are not in full harmony, the general trend of opinion sustains the right in garnishment as well as in insolvency or bankruptcy proceedings. Here defendants were depositors in garnishee bank, were insolvent, and the bank held their promissory note to an amount equal to their deposit account. In this state of the facts, the bank was summoned as garnishee in an action against the depositors, and from the beginning insisted on its rights to set off the notes against the account. The authorities sustain the right. 2 Shinn on Attachment, 624; Lannan v. Walter et al., 149 Mass. 14, 20 N. E. 196; Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; St. Paul & M. Trust Co. v. Leck, 57 Minn. 87, 58 N. W. 826, 47 Am. St. Rep. 576; Lynde v. Watson, 52 Vt. 648; Smith v. Stearns, 19 Pick. (Mass.)

20; Bank v. Nathan, 138 Ala. 342, 35 South. 355; 20 Cyc. 1072, and cases cited. It is stated in Shinn on Attachment, *supra*, that the policy of the law is that the garnishee, being an indifferent and sometimes an unwilling party to litigation, shall not be disturbed in his rights, and he is permitted to interpose in defense all equities and defenses existing in his favor at the time he is served with process, and which he might have enforced by any of the modes allowed at common law or by statutes, had the action been brought against him by the defendant. The same principle is thus expressed in 20 Cyc. 1060: "Plaintiff, seeking to subject a debt due to the principal defendant, acquires no greater right by the service of a writ of garnishment than that which defendant could have asserted and enforced in an action aga'inst the garnishee; and the fact that garnishment process has been served on the garnishee places him in no worse position and under no greater liability than he would have been in or under had an action at law been brought aga'inst him by defendant." See, also, Waples-Platt Co. v. Railway Co., 95 Tex. 486, 68 S. W. 265, 59 L. R. A. 389.

While it is true that the plaintiff in garnishment proceedings acquires by the service of summons upon the garnishee a lien upon all money or property in his hands belonging to the defendant, the lien, existing by force of the garnishment only, is, under the doctrine stated, subject and inferior to the equities existing in favor of the garnishee against the defendant. The plaintiff in such an action stands in no better position than the defendant, with no greater rights. In fact, he occupies a position similar to that held by a purchaser of overdue commercial paper, or an assignee of a chose in action, which our statutes declare are taken subject to all equities and defenses in favor of the debtor. So the question in the case at bar is whether the bank, in an action by the depositor to recover the amount of his deposit, could interpose as set-off notes held against him, though not yet due. The authorities cited answer the question in the affirmative. The fact that the notes were not due does not change the situation from an equitable standpoint. Defendants were insolvent at the time the garnishment was served, and that fact furnishes the necessary foundation for an application of the right of set off. Nashville Trust Co. v. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710.

But it is insisted that defendants were not insolvent within the meaning of the law of equitable set-off. The fact of their insolvency

at the time the garnishment summons was served is not questioned, however; but it is insisted that this is not enough—that to give rise to the right of set-off, especially of unmatured obligations, an adjudication of insolvency in insolvency or bankruptcy proceedings should appear. Or, as counsel express it: "Insolvency is a condition which must find expression in some act or declaration of the insolvent which can be given recognition in law." We are unable to concur in this contention. Viewing the doctrine of equitable set-off in the light of its purpose, to protect the rights of all the parties, and to administer even and exact justice, it would seem that insolvency in fact, whether accompanied by judicial recognition or not, is alone sufficient. To adopt counsel's contention and apply the limitation suggested would confine the right of set-off to insolvency or bankruptcy proceedings, and entirely exclude its application in garnishment proceedings; for such proceedings, as a rule, at least, precede insolvency or bankruptcy proceedings, wherein there is a judicial recognition of insolvency. So that, if adjudication of insolvency, or some act or declaration of the insolvent which the law would recognize as evidence of the fact, be essential, the right of set-off could rarely be granted in favor of a garnishee.

Nor does the fact, asserted by counsel for intervener, that the bank was unaware of the insolvency of defendants at the time the summons was served, militate against its position. Nor should it be deprived of the right it now insists upon because no demand had been made for the payment of the notes prior to the service of the summons. Whether it knew in fact of defendant's insolvency is in no proper view controlling. It asserted the right to set-off in its disclosure, and again when application for judgment was made by the intervener, and this was all it was required to do for the protection of its rights.

Order affirmed.

NOTE.—Insolvency as Giving to Garnishee the Right to Deduct an Unmatured Debt to Him.—The question considered by the principal case is one of great importance to banking institutions, and, taking it that a garnishee bank has the same right to protect itself as if it were sued by defendant, the ruling seems well supported. We have run down the cases which the principal case cites and added others, as follows:

In Shinn on Attachment, cited in support by the opinion in the principal case, there is nothing said as to insolvency creating the exception claimed. In the Lannan case the only question decided was that: "If before final answer the debtor becomes indebted to the trustee (garnishee) on any contract entered into before the service of the writ, the latter shall have a right to set-

off, and be chargeable only with the final balance, if one should be due." We take that to be an authority against, instead of supporting, the principal case. It merely differs with other cases in fixing the time of the answer for stating an account between them, and not the time of the service of the writ.

In the Leck case the facts show that an insolvent bank assigned for the benefit of its creditors, assigning among other things the promissory note of a maker who held a certificate of deposit issued by the assignor due at a future date. To the assignee's suit the maker pleaded the certificate by way of set-off. The court, admitting decisions to be in hopeless conflict, decided that it would follow those sustaining the right as against an insolvent, the case further holding that actual assignment did not toll the right. The Linde case is not an authority either way. It is said: "The (Vermont) statute constitutes the law on this subject and as the terms are explicit, there is no office for judicial construction." In the Nathan case no question about insolvency or non-matured indebtedness in favor of the garnishee was involved.

In the Shuler case the opinion is by Justice Miller and it is well to quote in full what is said: "As we understand the law concerning the condition of a garnishee in attachment, he has the same rights in defending himself against that process at the time of its service upon him that he would have had against the debtor in the suit for whose property he is called upon to account. And while it may be true that in a suit brought by Israel against the bank it could in an ordinary action at law only make plea of set-off of so much of Israel's debt to the bank as was then due, it could by filing a bill in chancery in such case, alleging Israel's insolvency, and that, if it was compelled to pay its own debt to Israel, the debt which Israel owed it, but which was not due would be lost, be relieved by proper decree in equity; and as a garnishee is only compelled to be responsible for that which both in law and equity, ought to have gone to pay the principal defendant in the main suit he can set up all the defenses in this proceeding which he would have in either a court of law or a court of equity." In other words, Justice Miller holds that an answer by a garnishee, one brought into a controversy *in initium*, has larger latitude in pleading than a defendant. He can make of his answer both a pleading at law and in equity. Kentucky Flour Co. v. Bank, 90 Ky. 225, 13 S. W. 910 proceeds upon a similar theory.

Nashville Trust Co. v. Bank, 91 Tenn. 356, was not a garnishment case, but set-off by defendant and it supports the principal case in principle. This case reviews the authorities *pro* and *con*. It is stated that Lockwood v. Beckwith, 6 Mich. 168, 72 Am. Dec. 69; Jordan v. Bank, 74 N. Y. 467, 30 Am. Rep. 319; Hannon v. Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378 are opposed.

In Iler v. Rieger, 69 Mo. App. 64, the Missouri rule is declared that "a demand cannot be set-off because of the insolvency of plaintiff in equity any more than at law, unless it existed against the plaintiff in favor of the defendant at the time of the commencement of the suit and had then become due." See also Frowein v. Calind, 75 id. 567. This seems an application of the principle that equity follows the law. Garnishee being on same footing as if he were de-

fendant is held not allowed to embrace unmatured indebtedness.

Chipman v. Bank, 120 Pa. 86, held an assignment cut out unmatured indebtedness because thereby a preference would be obtained. *Bennett v. Campbell*, 189 Pa. 647, impliedly approves the *Chipman* case.

Holmes & Co. v. Pope & Fleming (Ga. App.), 58 S. E. 281, was decided upon special facts. It announces that non-residence gives the right to embrace unmatured indebtedness and also says that the carrying out of a contract in the future whereby money "was to be advanced only for one special purpose beneficial to" garnishees gave them present right to apply what they presently owed to defendant toward payment of the note they held. In general principle it seems opposed to the principal case.

While the rule in Vermont is as shown in the *Linde* case fixed by statute, it was held in *Husted v. Stone & Dean*, 69 Vt. 149, that it did not extend to the inclusion of a note indorsed for the defendant.

It thus appears that there is considerable conflict in decision on this question. It would seem, too, that courts in line with the principal case go rather far, as does the case in 90th Kentucky, in applying the principle to an assignment, because thereby a very palpable preference seems wrought out. But generally it would seem just that mere insolvency should constitute an exception—especially with banks where unmatured indebtedness has arisen out of established relations. Certainly, however, in every jurisdiction allowing such a course to be taken by a defendant as Justice Miller indicates, a garnishee should be favored, and, being brought into a controversy as a mere stakeholder, he should not be compelled to resort to initiative proceedings, but freest choice and latitude should be allowed him in his answer. Of course, he assumes a burden in the establishment of alleged insolvency.

C.

JETSAM AND FLOTSAM.

INSANITY AS A DEFENSE TO CRIME.

Somewhat startling is the recommendation of a committee of nine members of the New York Bar Association, that insanity as a defense to crime be abolished. If this recommendation should be adopted, one charged with crime would have no right to adduce evidence either of his insanity at the time of his trial or of his insanity at the time he committed the act on which the criminal charge is based. His only recourse, in case of conviction, according to the plan recommended by the nine wise men of Gotham, would be to go before a commission of lunacy, who "must first decide that the man is insane before he can go before any judge and ask for his freedom."

This bizarre recommendation will not, we apprehend, receive much support either in New York or elsewhere; but the fact of its being made by nine members of the largest and most influential state bar association, who, it may be presumed, are always of at least average ability, is an indication of the profound dissatisfaction with which lawyers generally view the paralyzing effect upon the administration of the criminal law of the interposition of this defense in every case of the commission of a criminal

act under circumstances which, in the case of a sane person, would admit of no defense.

If any method can be devised to prevent the many miscarriages of justice due to the interposition of the defense of insanity where the defendant is absolutely sane when he commits the act charged, it should be adopted. The method suggested by the committee in question, of permitting the trial to proceed, without allowing any evidence to be introduced of the insanity of the defendant, either at the time of the commission of the act or at the time of trial, and then, after conviction is had, having the question of the prisoner's sanity determined by a board of lunacy, resulting in his release if the board should be of opinion that he may be allowed to go at large, hardly commends itself to sober judgment. As the law is at the present time, no sane person can be detained, although he may have heretofore been insane, and, while in that condition, may have done what, if done by a sane person, would constitute a crime. The law might well be amended to permit the detention, for such time as a board of qualified experts might determine, of any person who, having violated the law, pleads insanity as a defense; and this could be done without regard to the outcome of the prosecution. Under the plan proposed by the committee of the New York Bar Association, an insane criminal could be convicted and sentenced, but to not more than the maximum term of imprisonment provided by law for his offense. Assuming that the board of lunacy should fail to recommend his release, he would, at the end of his term, be released by process of law, and could not be detained as an insane person—supposing him to be sane at the time of his release—although, by reason of mental conditions likely to lead to recurring insanity, he might be a dangerous person to be at large.

A better plan would be to have the sanity of any person charged with crime, and who pleads insanity as a defense, inquired into by a board of lunacy in advance of the trial. If it should be determined that the accused was actually insane at the time he committed the act charged there would be no necessity for the trial; if it should be determined that he was sane at that time, then all evidence of his mental condition at the time of the commission of the act could be excluded.

It may well be questioned, however, whether any method can be devised of taking from the jury which tries one accused of crime the determination of his insanity, which will find acceptance with the courts. Ordinarily, intent is a necessary element of a crime. The accused must at least have intended to do the act with which he is charged, even though he may not have intended to commit a crime. But who can say that an insane person has any intent? He may point a loaded pistol at another and pull the trigger. If a sane person did this the law would presume an intent to shoot, because that is the necessary consequence of the act; but no one can say that an insane person intended the natural or necessary consequences of his act; for the distinction between a sane and an insane mind is that the former can reason from cause to effect, while the latter may not.—National Corporation Reporter.

[This excellent comment of our contemporary on what is termed a "startling" recommendation, suggests our own comment in 70 Cent.

L. J. 303, criticising a statute of Washington where this "startling" recommendation had been put into the form of a statute.

On that occasion we coined an addendum to the old saying, "Hard cases make bad law," by continuing, "so also pronounced abuses lead legislatures to foolish extremes."

Reformers in the law are sometimes like the bull in the china shop—they must sometimes be lassoed and bound, especially where in their fanaticism they seek to overturn established principles of justice in order to remedy some abuse that is uppermost in their mind for the moment.

Of course, the defense of insanity has been abused. So has the defense of the statute of limitations, and many other defenses allowed by law. Yet, to abolish all defenses which have been abused would throw our civilization back into barbarism and put every innocent person charged with crime at the mercy of an inflamed local public sentiment.

The sober sense of the people will not countenance the uprooting of these ancient landmarks approved by the consensus of ages.

One of these landmarks is the maxim: "Actus non facit reum nisi mens sit rea." (Act and intent must concur to constitute crime.) Reformers who desire to live under a jurisdiction where this maxim does not obtain might find the object of their desire among the cannibals of New Guinea, who, in their tropical mountain fastnesses, have hitherto repelled the advances of civilization, and, to-day, if reports are to be believed, are executing justice with a promptness and a disdain for "technical objections," that would be calculated to make one of our modern "reformers" shriek for joy. No guilty man ever escapes in New Guinea, and, it might be added, very few innocent men, either.

Let's have done with too many suggestions of reform, that strike at fundamental principles. Such suggestions will never gain the approval of sober-minded members of the profession, nor of any reputable representative of the legal press.

A. H. ROBBINS.]

CORRESPONDENCE.

AMERICAN PHILOSOPHICAL SOCIETY'S PRIZE ESSAY CONTEST.

Editor Central Law Journal:

The American Philosophical Society held at Philadelphia for promoting useful knowledge has the honor to announce that an award of the Henry M. Phillips Prize will be made during the year 1912; essays for the same to be in the possession of the society before the first day of January, 1912. The subject upon which essays are to be furnished by competitors is:

The treaty-making power of the United States, and the methods of its enforcement as affecting the Police Powers of the States.

The essay shall contain not more than one hundred thousand words, excluding notes. Such notes, if any, should be kept separate as an appendix.

The prize for the crowned essay will be \$2,000 (two thousand dollars) lawful gold coin of the

United States, to be paid as soon as may be after the award.

JAMES T. MITCHELL,
CRAIG BIDDLE,
MAYER SULZBERGER,
C. STUART PATTERSON,
JOSEPH C. FRALEY,
W W. KEEN,

Committee on the Henry M. Phillips Prize Essay Fund.
Philadelphia, Pa.

[The Henry M. Phillips Prize Essay Fund was presented to the American Philosophical Society held at Philadelphia for promoting useful knowledge in honor of her brother, Honorable Henry M. Phillips, who was a member of the society, by his sister, Miss Emily Phillips, of Philadelphia. In furtherance of the wishes of the donor, we understand, the society adopted the following rules and regulations:

Competitors for the prize shall affix to their essays some motto or name (not the proper name of the author, however), and when the essay is forwarded to the society it shall be accompanied by a sealed envelope, containing within, the proper name of the author, and, on the outside thereof, the motto or name adopted for the essay.

At a stated meeting of the society all essays received up to January 1, 1912, will be referred to a committee of judges, to consist of five persons, who shall be selected by the society from nomination of ten persons made by the standing committee on the Henry M. Phillips Prize Essay Fund.

Essays may be written in English, French, German, Dutch, Italian, Spanish or Latin; but, if any language except English, must be accompanied by an English translation of the same.

No treatise or essay shall be entitled to compete for the prize that has been already published or printed, or for which the author has received already any prize, profit, or honor, of any nature whatsoever.

All essays must be typewritten on one side of the paper only.

The literary property of such essay shall be in their authors, subject to the right of the society to publish the crowned essay in its transactions or proceedings.

All correspondence should be addressed to W. W. Keen, President, 104 South Fifth street, Philadelphia—Editor.]

HUMOR OF THE LAW.

A young gentleman who was undergoing an examination for admission before the Supreme Court of Montana, was asked the following question:

Q. "What is an easement?"

A. (After considerable study.) "A laxative is an easement."

Here is another before the same bar:

Q. "Define the two degrees of burglary in this state."

A. "Burglary in the first degree is the breaking into a building, and burglary in the second degree is the breaking out of a building."

WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
Resort, and of all the Federal Courts.**

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1. Adverse Possession—Rights of Squatters.—A mere squatter or trespasser holding possession without claim of title cannot acquire title by adverse possession.—Feller v. Lee, Mo., 124 S. W. 1129.

2. Appeal—Estoppel to Allege Error.—It is immaterial on appeal whether the measure of damages adopted below was correct where counsel for both parties agreed that it was the correct measure of damages applicable to the facts.—Kelly v. Delaney, 121 N. Y. Supp. 241.

3. Appeal and Error—Review.—In a suit to recover land sold under a partition decree, held, that the court on appeal cannot disturb the decree on the ground of minority or coverture where these questions were not raised in the trial court.—Hector v. Mann, Mo., 124 S. W. 1109.

4. Attorney and Client—Authority to Compromise.—Plaintiff's attorney has no authority to compromise with defendant's attorney or release defendant from liability, or to shift his liability by contracting with another to assume it.—Cullin-McCurdy Const. Co. v. Vulcan Iron Works, Ark., 124 S. W. 1023.

5. Bailment—Conversion.—Since a casual bailee of property has no lien on property for storage charges, his refusal to deliver the property until such charges were paid was prima facie a conversion thereof.—Alton v. New York Taxicab Co., 121 N. Y. Supp. 271.

6. Bills and Notes—Sale of Stock to Corporation.—An officer of a corporation who sold his stock to the corporation when the corporation was insolvent, cannot claim that he is a holder in due course of the notes given in payment for the stock, under Negotiable Instrument Act.—Burke v. Smith, Md., 75 Atl. 114.

7. Bankruptcy—Conditional Sales.—A reservation of title in a contract of conditional sale, which, although the contract is unrecorded, is good as against a bankrupt, is good as against his trustee.—York Mfg. Co. v. Brewster, U. S. C. C. of App. Fifth Circuit, 174 Fed. 568.

8. Construction Corporation.—A corporation held engaged principally in building construction, and not in manufacturing, and was therefore not within the bankruptcy act.—Walker Roofing & Heating Co. v. Merchant & Evans Co., U. S. C. C. of App., Fourth Circuit, 173 Fed. 771.

9. False Statement in Writing.—Drafts issued by an employee of a private banker when the latter was insolvent and shortly before his bankruptcy, on a bank where he had insufficient funds to meet them, held not to constitute false statements in writing made for the purpose of obtaining property on credit which barred his discharge.—Firestone v. Harvey, U. S. C. C. of App., Sixth Circuit, 174 Fed. 574.

10. Fraudulent Transfer.—In order that a transfer by a bankrupt shall be fraudulent there must be an intent on the part of the bankrupt to hinder, delay, or defraud creditors, and there must also be a want of good faith on the part of the transferee.—Van Iderstine v. National Discount Co., U. S. C. C. of App., Second Circuit, 174 Fed. 518.

11. Mortgages.—A mortgage on a bankrupt's stock of goods for money loaned at the time the mortgage was executed is not invalidated by the bankrupt act.—Simmons v. Greer, U. S. C. C. of App., Fourth Circuit, 174 Fed. 654.

12. Preferences.—Transfer of accounts by a bankrupt while insolvent in consideration of money obtained and used to pay preferred creditors held not fraudulent.—Van Iderstine v. National Discount Co., U. S. C. C. of App., Second Circuit, 174 Fed. 518.

13. Banks and Banking—Making False Entries.—Upon a charge against an officer of a national bank of making false entries in the books of the bank, it is immaterial whether defendant made the entries in person or caused them to be made by a clerk or bookkeeper.—Morse v. United States, U. S. C. C. of App., Second Circuit, 174 Fed. 539.

14. Misapplication of Funds.—In a prosecution of an officer of a national bank for misappropriating its funds, where the transactions as shown by the books of the bank were legitimate and proper on their face, the question of intent is one for the jury under proper instructions.—Walsh v. United States, U. S. C. C. of App., Seventh Circuit, 174 Fed. 615.

15. Bonds — Formal Requisites.—A bond signed by a bonding company alone, may be accepted as a compliance with an order requiring a party to a suit to file a bond to secure a payment, but not prescribing its form.—Hudson-Fulton Celebration Committee v. Hess, U. S. C. C., S. D. N. Y., 173 Fed. 797.

16. Brokers—Action for Compensation.—In an action by a broker for compensation for obtaining a purchaser for defendant's property, evidence held insufficient to show that a letter revoking plaintiff's authority was written in bad faith in order to defeat plaintiff's claim for compensation.—Benton v. Brown, Iowa, 124 N. W. 815.

17. Withdrawal of Authority.—An owner cannot by withdrawal of authority to find a

purchaser affect the agent's right to a commission, where he has found a purchaser, though he may not have formally agreed upon the terms of sale.—*Tilden v. Smith*, S. D., 124 N. W. 841.

18. **Carriers—Injury to Animal on Track.**—Although a mare was a trespasser on a railroad track, if the negligence of the railroad company's employees was the proximate cause of her death, the company is liable.—*Missouri, K. & T. Ry. Co. of Texas v. Byrd*, Tex., 124 S. W. 993.

19.—**Injury to Shipment.**—In the absence of proof, it will be presumed that an injury to goods transported by connecting carriers was caused by the last carrier.—*Gibson & Draughn v. Little Rock & H. S. W. Ry. Co.*, Ark., 124 S. W. 1033.

20.—**Injury to Passenger.**—It is not negligence per se to get on or off a moving train, but the question of negligence is for the jury.—*Missouri Pac. Ry. Co. v. Irvin*, Kan., 106 Pac. 1063.

21.—**Notice of Arrival of Goods.**—Where a carrier is required to give notice of the arrival of the goods, there is a corresponding duty devolving on the consignee to put himself in a position to receive the notice.—*St. Louis, I. M. & S. Ry. Co. v. Townes*, Ark., 124 S. W. 1036.

22.—**Value of Live Stock Carried.**—Agreed value of horses shipped, so out of harmony with actual value as to indicate that the question of value was not in fact considered, held not binding.—*Berry v. Chicago, M. & St. P. Ry. Co.*, S. D., 124 N. W. 859.

23. **Certiorari—Right to Remedy.**—Petitioners for a writ of certiorari who are not parties to the record and have no direct legal interest in the proceedings complained of cannot maintain the writ.—*Lord v. County Com'r's for Cumberland County, Me.*, 75 Atl. 126.

24. **Chattel Mortgages—Power of Sale.**—Power of sale contained in a chattel mortgage, in order to pass title to the purchaser, must be strictly followed.—*Hutchins-Hanks Coal Co. v. Walnut Land & Coal Co.*, Mo., 124 S. W. 1098.

25. **Constitutional Law—Police Power.**—A statute, purporting to have been enacted in the exercise of the state's police power, which in fact has no real relation to the public health, morals or safety, or invades constitutional rights, will be held invalid.—*Edge v. City of Bessemer, Ala.*, 51 So. 246.

26.—**Regulation of Game.**—Statutes regulating the hunting of game must affect alike all persons similarly situated.—*Harper v. Galloway*, Fla., 51 So. 226.

27. **Contracts—Quantum Meruit.**—That which would make an owner liable on a quantum meruit held not necessarily to waive his right to recoup damages for the contractor's breach.—*R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, Ala., 51 So. 263.

28.—**Rescission.**—Where rescission of a contract has been lawfully made, the party not in fault may recover the consideration paid and necessary expenditures.—*King Bros. v. Perfection Block Mach. Co.*, Kan., 106 Pac. 1071.

29. **Contribution—Statutory Provisions.**—Under Rev. Codes, sec. 4499, providing for contribution between joint-judgment debtors, held

that when application is made for an order directing an execution on a joint judgment the court has no authority to enter judgment against a joint debtor for the proportionate part of the judgment he should pay.—*Dunn v. Stuflebeam*, Idaho, 106 Pac. 1129.

30. **Corporations—Consolidation.**—Where a corporation transfers all its assets to another, receiving in return stock in such other, the new corporation held liable to the extent of the value of the property acquired for the debts of the old.—*City of Altoona v. Richardson Gas & Oil Co.*, Kan., 106 Pac. 1025.

31.—**Occupation Tax.**—An agent of a telephone company may be prosecuted for the failure of the company to take out a license as required by municipal ordinance.—*Williams v. City of Talladega*, Ala., 51 So. 330.

32.—**Powers of Directors in Fixing Salaries.**—A resolution adopted by three directors of a corporation, fixing their salaries as officers, held not binding on the corporation.—*Sturndorf v. Samural Co.*, 121 N. Y. Supp. 217.

33.—**Powers of Officers.**—Where the president of a corporation has been accustomed to borrow money for the corporation without authority from the directors, the corporation is estopped to deny his authority as against one who loaned him money for the corporation.—*Buchwald Delivery & Express Co. of Baltimore City v. Hurst*, Md., 75 Atl. 111.

34.—**Transfer of Assets.**—One corporation, by securing the assets of another corporation in a bona fide manner, does not thereby become liable for the debts of the transferring corporation.—*Spear Mining Co. v. T. J. Shinn & Co.*, Ark., 124 S. W. 1045.

35. **Courts—Presumption as to Jurisdiction.**—It is to be presumed in favor of a judgment in personam on a claim for which liability is conceded, rendered by a competent court of general jurisdiction of another state, that it duly obtained jurisdiction over defendant's person and was authorized to enter the judgment.—*Coakley v. Rickard*, 121 N. Y. Supp. 280.

36.—**Previous Decision as Controlling.**—The trial judge is not bound, on the question of the statute of limitation, to follow a decision of another judge previously made in disposing of a demurrer.—*Appeal of Baftsley*, Conn., 75 Atl. 141.

37. **Covenants—Damages for Breach.**—For a breach of covenant of warranty, causing an entire failure of title, the vendee can recover no more than the purchase price, with interest.—*Allinder v. Bessemer Coal, Iron & Land Co.*, Ala., 51 So. 234.

38. **Criminal Evidence—Admissibility.**—On a trial for robbery, the state held entitled to show whether accused wore a wig, and to prove that she owned one, and that one was found in her home shortly after the crime.—*Lewis v. State*, Ala., 51 So. 308.

39. **Criminal Law—Intent.**—The legislature may dispense with the necessity of a criminal intent in committing an offense, and punish without regard to the mental attitude of the doer.—*Mills v. State*, Fla., 51 So. 278.

40.—**Place of Residence.**—There is no principle of constitutional law entitling one to be tried for a criminal offense in the district where he resides.—*Haas v. Henkel*, U. S. S. C., 30 Sup. Ct. 249.

41.—Reputation.—In a prosecution for homicide, where defendant introduced evidence as to his peaceable disposition, evidence in rebuttal by the state as to his reputation in other ways was prejudicial error.—*State v. Frederickson*, Kan., 106 Pac. 1061.

42.—Testimony of Accomplice.—At common law there was no absolute prohibition against the conviction of a person charged with crime upon the uncorroborated testimony of an accomplice.—*In re Hardenbrook*, 121 N. Y. Supp. 250.

43. **Criminal Trial—Acts of Co-Defendant.**—In a prosecution of two for burglary, in the absence of evidence of co-operation between them, evidence that goods stolen were found in the possession of either defendant is not admissible against the other.—*Love v. State*, Tex., 124 S. W. 932.

44.—Former Jeopardy.—A former acquittal, resulting from variance in the name of the person alleged to have been assaulted, held not to constitute jeopardy.—*Reynolds v. State*, Tex., 124 S. W. 931.

45.—Removal of Prisoner to Another Federal District.—The prosecution of proceedings for removal to another federal district of a person there charged with an offense against the United States held not an unlawful interference with the jurisdiction of a federal court for another district, in which an order for removal of the accused for a similar offense has been stayed pending appeal.—*Peckham v. Henkel*, U. S. S. C., 30 Sup. Ct. 255.

46. **Courtesy—Estoppel.**—A husband and wife having executed joint blank deeds to divide their real estate, the husband after the wife's death held estopped to claim dower in certain property intended to be partitioned to the wife and by her conveyed to a trustee.—*Manatt v. Griffith*, Iowa, 124 N. W. 758.

47. **Damages—Aggravation of Unsound Physical Condition.**—Aggravation of an unsound physical condition, caused by the negligent act of a defendant, may be considered in ascertaining the amount of plaintiff's damages.—*Haufler v. Public Service Ry. Co.*, N. J., 75 Atl. 163.

48.—Failure to Furnish Materials.—The measure of damages for a materialman's failure to furnish materials within a reasonable time is the rental value of the building during the delay.—*Leifer Mfg. Co. v. Gross*, Ark., 124 S. W. 1039.

49.—Liquidated Damages.—Where a contract not to engage in a rival business in a particular locality within a specified time provides for the payment of a stipulated sum on a breach, the amount is regarded as liquidated damages, and not as a penalty.—*Wills v. Forester*, Mo., 124 S. W. 1090.

50.—Mental Anguish.—Mental anguish is not a recoverable element of actual damages growing out of a mere breach of contract.—*Birmingham Waterworks Co. v. Vinter*, Ala., 51 So. 356.

51.—Punitive Damages.—A person is without legal right to punitive damages, and they may be affirmatively withheld by the legislature, so far as impinging rights of property is concerned.—*Louisville & N. R. Co. v. Street*, Ala., 51 So. 306.

52. **Death—Distribution Under Statute for Wrongful Death.**—In an action for wrongful

death, the statute of the state where the accident occurs, and not that of decedent's domicile, governs the distribution of the fund.—*Bolinger v. Beachman*, Kan., 106 Pac. 1094.

53. **Deeds—Undue Influence.**—The law held to presume the exercise of undue influence in voluntary conveyances, where confidential relations existed between the parties.—*Nelson v. Brown*, Ala., 51 So. 360.

54. **Dower—Conveyances in Fraud of Wife.**—A conveyance of land by a man in contemplation of marriage without the knowledge of his intended wife, and with the intention to prevent her rights of dower and homestead from attaching to the lands, is a fraud on her rights, against which equity will grant relief.—*Nelson v. Brown*, Ala., 51 So. 360.

55. **Equity—Cross-Bill.**—A cause of action for which a cross-complainant would not be entitled to file an original bill cannot be enforced by cross-bill.—*New York & N. J. Water Co. v. Borough of North Arlington*, N. J., 75 Atl. 177.

56.—**Laches.**—In an application of the doctrine of laches, equity acts in accordance with the analogy furnished by the statute of limitations.—*Fowler v. Alabama Iron & Steel Co.*, Ala., 51 So. 393.

57. **Estoppel—Acceptance of Benefits.**—A party accepting the benefits of a judgment in condemnation proceedings held estopped from claiming that the judgment is void.—*James v. City of Seattle*, Wash., 106 Pac. 1114.

58.—**Acquiescence.**—Where plaintiffs accepted the proceeds of a partition sale, they thereby elected to affirm the sale and were estopped to question it.—*Hector v. Warren*, Mo., 124 S. W. 1119.

59.—**Knowledge.**—No equitable estoppel can exist where the facts were known to both parties, or where both had the same means of ascertaining the truth.—*Logan v. Davis*, Iowa, 124 N. W. 808.

60. **Evidence—Boundaries.**—Field notes and maps prepared for and used in the general land office, held admissible as original evidence.—*Finberg v. Gilbert*, Tex., 124 S. W. 979.

61.—**Burden of Proof.**—A presumption will serve in the place of evidence, but should never be placed in the scale to be weighed as evidence.—*Peters v. Lohr*, S. D., 124 N. W. 853.

62.—**Carbon Copies of Contract.**—Where a contract was type-written, and three carbon copies made, there could be no question of primary or secondary evidence.—*R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, Ala., 51 So. 263.

63.—**Mailing Letter.**—Where a notice to terminate a contract was properly addressed with postage prepaid, and mailed, the presumption is that it was received.—*Kruger v. Brown*, N. J., 75 Atl. 171.

64.—**Presumptions.**—Where the law of another state is material, a mistake concerning it is a mistake of fact.—*Bolinger v. Beacham*, Kan., 106 Pac. 1094.

65. **Federal Courts—Actions by and Against Partnership.**—A partnership cannot sue or be sued in its partnership name in a circuit court of the United States without alleging the citizenship of its individual members.—*H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co.*, U. S. C. C., N. D. Ia., 174 Fed. 668.

66.—**Exemplary Damages.**—In the absence of express statute, federal courts will exercise their own judgment uncontrolled by state decisions on the question whether a carrier is liable for exemplary damages for wanton and oppressive conduct by a servant towards a passenger.—*Norfolk & P. Traction Co. v. Miller*, U. S. C. C. of App., Fourth Circuit, 174 Fed. 697.

67. Fire Insurance—Stipulation Against Incumbrance.—Where a fire policy provided that if the property was or became incumbered, it should be void, unless otherwise agreed, the subsequent execution of a mortgage thereon by the owner without the company's consent avoided the policy.—*Moore v. Crandall*, Iowa, 124 N. W. 812.

68. Frauds, Statute of—Operation and Effect.—An oral contract in part to convey realty cannot support an action, but it is not a mere nullity, and may be available as a factor in or to void a defense.—Appeal of Beardsley, Conn., 75 Atl. 141.

69.—Original Undertaking.—The promise of the owner of a building to pay for materials furnished solely on his credit if the contractor did not, held an original undertaking not within the statute of frauds.—*Leifer Mfg. Co. v. Gross*, Ark., 124 S. W. 1039.

70.—Sale of Goods.—In an action against the purchasers of potatoes, an order for the potatoes signed by the purchaser cannot be rejected in evidence as conflicting with the statute of frauds, as defendants in that action would be the parties sought to be charged.—*Schaefer v. C. W. Whitham & Son*, Iowa, 124 N. W. 763.

71. Gifts—By Child to Parent.—As it is presumed that a child is under the influence of its parent, in case of a gift from child to parent, the burden of proof is on the parent to show that there was no parental duress or influence.—*Cooley v. Stringfellow*, Ala., 51 So. 321.

72.—Delivery.—To constitute a gift there must be a delivery of the property with intent by the donor to divest himself of title and possession.—*Wheeler v. Armstrong*, Ala., 51 So. 268.

73. Habeas Corpus—Scope of Review.—Matters in abatement are not open on habeas corpus to test validity of proceedings to remove to another federal district for trial a person charged with an offense there against the United States.—*Haas v. Henkel*, U. S. S. C., 33 Sup. Ct. 249.

74. Indemnity—Joint Wrongdoers.—There can be no indemnity as between joint tortfeasors unless the one seeking indemnity did not join in the commission of the unlawful act, and has been made to suffer therefor in damages.—*City of Georgetown v. Gross*, Ky., 124 S. W. 888.

75. Interstate Commerce—Police Power.—State laws, enacted in the exercise of police power and remotely affecting interstate commerce, being in aid thereof, may be enforced, unless superseded by act of congress, if they are reasonable in operation.—*Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co.*, Minn., 124 N. W. 819.

76.—What Constitutes—Merchandise transported between two points within the state, but carried by a carrier's lines through a neighboring state, is interstate commerce.—Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. Ry. Co., Minn., 124 N. W. 819.

77. Intoxicating Liquors—Parties in Suit to Enjoin.—The omission of a necessary party in a suit to enjoin the maintenance of a liquor nuisance is not a jurisdictional defect.—*Dennard v. Parker*, Iowa, 124 N. W. 780.

78.—Prohibition Laws.—The prohibition of the manufacture and sale of intoxicating liquors is a constitutional exercise of the state's police power.—*Edige v. City of Bessemer*, Ala., 51 So. 246.

79.—Statute.—The legislature may extend the prohibition of a statute regulating the sale of liquors to beverages not in fact intoxicating.—*Sawyer v. Botti*, Iowa, 124 N. W. 787.

80. Judgment—Collateral Attack.—The right to assail a judgment collaterally by proving absence of proper proof of service is not available.—*Menz v. Mehner*, Wash., 106 Pac. 1118.

81.—Questions Decided.—A decision of the United States Supreme Court held to necessarily decide that the statute under which a cause was removed to a federal circuit court was valid, so that its invalidity could not be raised

on remand to the state court for retrial.—*McCabe's Adm'r v. Maysville & B. S. R. Co.*, Ky., 124 S. W. 892.

82.—Recitals.—A recital in the judgment of service on a defendant involves absolute verity in a collateral proceeding.—*Douglas v. State*, Tex., 124 S. W. 938.

83. Landlord and Tenant—Recovery of Possession.—A landlord dispossessing a tenant for default held entitled only to retain so much of the deposit by the tenant as would pay the rent which had accrued at the time of taking possession.—*Cunningham v. Stockton*, Kan., 136 Pac. 1057.

84. Lien—Illegal Sale.—To constitute the offense of selling property subject to a statutory lien, the sale of the property must be made by the debtor during the existence of the lien.—*Mills v. State*, Fla., 51 So. 278.

85. Life Insurance—Incontestability.—An agreement in a life policy that it shall be incontestable except for nonpayment of premiums after two years limits all defenses, including fraudulent representations as to physical condition, except nonpayment of premiums.—*Drews v. Metropolitan Life Ins. Co.*, N. J., 75 Atl. 167.

86. Livery Stable Keepers—Ballments.—A contract between a livery stable keeper and one who hires a horse and carriage from him constitutes a bailment.—*Gibson v. Bessemer & L. E. R. Co.*, Pa., 75 Atl. 194.

87. Mandamus—Conditions Precedent.—Mandamus will not issue commanding an inferior court or ministerial body to act until it is first established by evidence that the court or body has been legally requested to act, and that it has illegally declined to do so.—*State ex rel. Abbott v. Adcock*, Mo., 124 S. W. 1100.

88. Master and Servant—Injury to Servant.—A master is liable for his negligence resulting in injury to a servant, though the negligence of a third person concurs in producing the injury.—*Buchanan & Gilder v. Murayda*, Tex., 124 S. W. 978.

89.—Servant Lent by Third Person.—Where a servant is loaned by his master to another, who puts him to work, the other owes him the duties due from a master to a servant.—*Wyman v. Berry*, Me., 75 Atl. 123.

90. Mines and Minerals—Estates Conveyed.—Where a deed of land does not limit the estate conveyed, it embraces the minerals thereunder, as well as the surface.—*Richards v. Potter*, Ky., 124 S. W. 850.

91. Monopolies—Anti-Trust Act.—A coal company, mining and selling its coal, is not prohibited by Act July 2, 1890, c. 647, from refusing to sell its coal, or selecting its customers, or fixing different prices and different terms to different customers.—*Union Pacific Coal Co. v. United States*, U. S. C. of App., Eighth Circuit, 173 Fed. 737.

92.—Foreign Corporations.—A foreign corporation transacting business in the state violating the anti-trust laws may forfeit its right to do business in the state, or may be prohibited from engaging in the illegal practices.—*State v. International Harvester Co. of America*, Kan., 106 Pac. 1053.

93. Mortgages—Foreclosure Proceedings.—Any waiver of the mortgagor's right to mature the indebtedness because of noncompliance with the terms of the mortgage must be pleaded to be available to the mortgagor in an action to foreclose.—*Moore v. Crandall*, Iowa, 124 N. W. 812.

94. Municipal Corporations—Defective Streets.—Notice to a city councilman that a walk is in need of repair is sufficient notice to the city.—*Weinhardt v. City of New Orleans*, La., 51 So. 286.

95.—Streets.—The right of ownership to the center line of a street by an adjoining property owner is subject to the public use expressly conferred by the deed of dedication.—*Sea Isle City Realty Co. v. Sea Isle City*, N. J., 75 Atl. 173.

96. Negligence—Accident at Railroad Crossing.—Negligence of bailee of horse and buggy held not to be imputed to the owner of the

horse so as to prevent him from recovering for the horse killed at a railroad crossing.—Gibson v. Bessemer & L. E. R. Co., Pa., 75 Atl. 194.

97.—**Children.**—A person 16 years old is bound to use that degree of care which ordinarily prudent persons of his age and intelligence are accustomed to use.—Wyman v. Berry, Me., 75 Atl. 128.

98.—**Imputed Negligence.**—The negligence of the driver of an automobile is not imputable to an occupant, who is riding as the guest of another, and has no control over the movements of the car.—Dale v. Denver City Tramway Co., U. S. C. C. of App., Eighth Circuit, 173 Fed. 787.

99.—**Pleading.**—Negligence may be alleged generally, and the facts constituting it need not be set out.—Pittsburg, C. C. & St. L. Ry. Co. v. Schaub, Ky., 124 S. W. 885.

100.—**Res Ipsa Loquitur.**—Where the inference of negligence tended to establish an act of negligence not pleaded, as well as that specifically alleged, the doctrine of res ipsa loquitur was inapplicable.—Gulf Pipe Line Co. v. Brymer, Tex., 124 S. W. 1007.

101. **New Trial—Grounds.**—A second new trial for excessive damages should not be granted, where the damages are largely within the discretion of the jury.—Halness v. Anderson, Minn., 124 N. W. 770.

102. **Nuisance—Injury as Permanent or Continuing.**—In suing for damages from a permanent nuisance, plaintiff may elect whether he will treat the injury as permanent or continuing.—Risher v. Acken Coal Co., Iowa, 124 N. W. 764.

103. **Parent and Child—Education of Child.**—Though a father is primarily bound to support and educate his children, if he is not able to do so, assistance will be granted him from their private estate, if any they have.—Cooley v. Stringfellow, Ala., 51 So. 321.

104. **Partnership—Sale of Partnership Interest.**—A copartner's purchase of his copartner's interest in the firm, without informing him of the settlement of litigation which materially increased the value of the interest sold, held a fraud upon the selling partner.—Kelly v. Delaney, 121 N. Y. Supp. 241.

105. **Principal and Agent—Authority of Agent.**—Authority of a landlord's agent to receive payments when due held not to authorize him to receive payment of rent before it was due.—Realty Transfer Co. v. Kimball, 121 N. Y. Supp. 279.

106. **Principal and Surety—Discharge of Surety.**—A surety on a note executed since the enactment of the negotiable instruments law is primarily liable thereon, and hence presentation, demand, protest for nonpayment, and notice thereof are not necessary as to him.—Fritts v. Kirchdorfer, Ky., 124 S. W. 882.

107. **Railroads—Duty Towards Passengers.**—A railroad company owes no duty to a trespasser on the track except not to injure him maliciously or with gross and reckless carelessness.—Chesapeake & O. Ry. Co. v. Hawkins, U. S. C. C. of App., Fourth Circuit, 174 Fed. 597.

108.—**Look and Listen Rule.**—The law does not require one to stop, look and listen before crossing a railroad track, but only to exercise ordinary care.—Chesapeake & O. Ry. Co. v. Hawkins, Ky., 124 S. W. 836.

109.—**Persons Working About Cars.**—A railroad crew must anticipate the presence of persons about a car on a private siding not ready to be moved, in charge of the shipper, and should not bump against it without notice.—Pittsburg, C. C. & St. L. Ry. Co. v. Schaub, Ky., 124 S. W. 885.

110. **Removal of Causes—Diverse Citizenship.**—A partnership suing as such in a state court cannot prevent removal of the cause on the ground of diverse citizenship, if its individual members are shown by the removal petition to be each and all citizens of a different state than the defendant.—H. L. Bruett & Co. v. F. C. Austin Drainage Excavator Co., U. S. C. C., N. D. Iowa, 174 Fed. 668.

111. **Sales—Transfer of Title.**—In determining whether or not title to personal property has passed under a contract of sale, the primary consideration is one of intention.—Snohomish Iron Works v. Guhr Lumber Co., Wash., 106 Pac. 1124.

112. **Specific Performance—Parties Entitled.**—One of several parties to whom another contracted to convey land held not entitled to enforce specific performance thereof to himself alone.—Hammond v. Northwestern Construction & Improvement Co., N. D., 124 N. W. 838.

113. **Street Railroads—Injury to Allighting Passengers.**—A passenger, incumbered with small bundles, who steps from an electric car in the dark, while it is slowing up to stop and is barely moving, is not guilty of contributory negligence as a matter of law.—Birmingham Ry., Light & Power Co. v. Girod, Ala., 51 So. 242.

114.—**Operation of Cars.**—A motorman approaching a crossing on which a wagon was being drawn toward the track held under no greater duty to slow up and stop than is the driver of the wagon.—McKeon v. Connecticut Co., Conn., 75 Atl. 139.

115. **Taxation—Exemptions.**—Incorporating a railway company with power to exercise powers and privileges conferred by an earlier act incorporating another railway company does not confer immunity from taxation enjoyed by the earlier act.—Wright v. Georgia R. & Banking Co., U. S. S. C., 30 Sup. Ct. 242.

116. **Telegraphs and Telephones—Accepting Message by Telephone.**—A telegraph company, after accepting a message by telephone, cannot claim that the conditions in its printed forms are applicable where it is accustomed to receive messages in that way.—Gore v. Western Union Telegraph Co., Tex., 124 S. W. 977.

117. **Tenancy in Common—Community Estate.**—Where the survivor holds the community estate, and does not act in repudiation of the interests of the heirs of the deceased spouse, the holding is as a tenant in common.—Wingo v. Rudder, Tex., 124 S. W. 899.

118. **Tender—Excuses for Failure to Make.**—A tender need not be made if it would not be accepted.—Livington v. Commonwealth Security Co., Wash., 106 Pac. 1125.

119. **Trade-Marks and Trade-Names—Infringement.**—A preliminary injunction to restrain alleged unfair competition denied, where the article sold by defendant bore a label which conformed to an order of court made in a suit by complainant against the manufacturer.—Societe Anonyme, etc., Benedictine v. Hygrade Wine Co., U. S. C. C., S. D. N. Y., 173 Fed. 796.

120. **Trial—Order of Proof.**—In an action on contract, evidence of defendant's admission of liability was part of plaintiff's case in chief, and may be excluded on rebuttal.—Hathaway v. Williams, Me., 75 Atl. 129.

121. **Trusts—Title of Trustee.**—A deed to a grantee as trustee without limitation constitutes the grantee a trustee of an express trust, and the legal title is in him.—Merr v. Mehner, Wash., 106 Pac. 1118.

122. **Vendor and Purchaser—Unrecorded Deed.**—For grantee in quitclaim deed to take advantage of statute requiring deeds to be recorded, and defeat title under earlier unrecorded deed, he must have paid a valuable consideration.—Morris v. Wicks, Kan., 106 Pac. 1048.

123. **Waters and Water Courses—Discrimination in Rates.**—If a rate to favored customers by a water company is less than the reasonable rate, it does not impinge on rights of consumers generally.—State v. Birmingham Waterworks Co., Ala., 51 So. 354.

124. **Wills—Renunciation by Widow.**—Where a widow elects to take under the law, the provisions of the will, where it can be done, will be administered as to the other persons.—Fennell v. Fennell, Kan., 106 Pac. 1038.

125. **Witnesses—Competency.**—In an action after grantor's death to set aside transfers of stock, the heirs cannot testify as to conversations with the grantor to show lack of capacity or undue influence.—Bannon v. P. Bannon Sewer Pipe Co., Ky., 124 S. W. 848.

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EXCESSIVE PENALTIES AFFECTING THE VALIDITY OF MAXIMUM RATE LEGISLATION.

In *Ex parte Young*, 209 U. S. 123, 13 L. R. A. (N. S.) 932, the opinion by the late Justice Peckham, dissented from by Justice Harlan, considers the contention that the Minnesota maximum rate statutes were "invalid on their face on account of the penalties."

Reviewing the provisions of these acts, the enormous penalties which would accrue during the time necessary to test their being or not confiscatory, and the practical impossibility of obtaining officers and agents threatened with fine and imprisonment, to carry on the business of a railroad, the court concluded, that the result of the attempted imposition of excessive penalties was "a denial of any hearing to the (railroad) company." The Justice said: "We hold, therefore, that the provisions of the acts relating to the enforcement of rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuccessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates. We also hold that the circuit court has jurisdiction * * * * to inquire whether the rates permitted by these acts or orders were too low, and therefore confiscatory, and if so held, that the court then had jurisdiction to permanently enjoin the railroad company from putting them in force, and that it also had power, while the inquiry was pending, to grant a temporary injunction to the same effect."

We perceive from this that the only question decided was that the penal sanction of the statute was taken away and then the court proceeds to inquire whether the prescribed rates are or not insufficient. But it would appear to us, that the first inquiry would be whether or not the provisions for enforcement, being eliminated, they are of that separable character, that the rest of the statute ought to stand, the test being whether or not the legislature would have enacted a law thus stripped of all provisions for its enforcement.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, the *Young* case was followed in the respect above set out, but the provisions as to rate were held unaffected. The opinion in this case was also by Mr. Justice Peckham. He said: "They (penalties) are not a necessary or inseparable part of the acts, without which they would not have been passed. * * * When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted, if that portion which is illegal, had been omitted, the remainder of the statute thus treated is good."

Just as in the *Young* case, the question considered was the right of a public service company to obtain injunction against enforcement, and as the gas company failed to prove the prescribed rates would prove confiscatory, we are left in doubt whether the prescribed penalties may be claimed, because the judgment in the supreme court was: "The decree is reversed and the case remanded to the court below with directions to dismiss the bill without prejudice." Therefore, we take it, that the complainant was denied all relief, except that "if hereafter it shall appear, under actual operation of the ordinance, that the returns allowed by it operate as a confiscation of property, nothing in this judgment will

prevent another application to the courts of the United States or to the courts of the state of Tennessee."

But in the Young case it seemed wholly unnecessary for the court to announce any such principle as it did, because, if the statute were attacked as prescribing confiscatory rates, there was ample enough ground for equitable interference in the fact, that the deterrent penalties amounted, practically, to a destruction of the business of a railroad, as it could find no agents or employee willing to take the risk of fine or imprisonment.

Taking, therefore, these two cases together, it may well be argued that Justice Peckham did not intend to go any further than Justice Brewer, whom he quotes, announced in *Cotting v. Stock Yards Co.*, 183 U. S. 99. In that case Justice Brewer said: "It is doubtless true that the state may impose penalties, such as will tend to compel obedience to its mandates by all, individuals or corporations, and if extreme and cumulative penalties are imposed only after there has been a final determination of the validity of the statute, the question would be very different from that here presented." Then the Justice goes on to say "*when the legislature, in an effort to prevent any inquiry,*" enacts such rates, then it would be a serious question, whether or not a statute thus intending was unconstitutional.

Justice Brewer was here speaking very cautiously, indeed, as we believe it would be thought by every lawyer, that if any court could deduce any such intent in a statute, it would undoubtedly hold that penalties thus imposed, whether they be "extreme and cumulative" or otherwise, would be illegally imposed.

Therefore we read with special interest that portion of the opinion of Judge Poffenbarger of West Virginia Supreme Court of Appeals in the case of *Coal & Coke Ry. Co. v. Conley et al.*, 67 S. E. 613, in which

he contends that the question is still open whether or not any statute of the character we have been considering becomes unconstitutional merely because of its providing for such penalties as have been described.

But with greater interest still do we follow the reasoning on this subject in an opinion, which, taken all in all, is one of the ablest judicial expositions of principles on all subjects it treats it has been our opportunity to read. We especially commend those parts of the opinion which demonstrate, with faultless logic, that a state is not such in the sense of the Eleventh Amendment, when its officers are prohibited by the courts from enforcing an unconstitutional statute and when equity may enjoin the enforcement of a criminal statute. These are examples of the sustained logic of a master, proceeding as easily and naturally on the elevated plane he has placed himself as others of us do in the ordinary walks of life.

Coming back, however, to that part of this opinion first above mentioned, we find the able judge reasoning, that general words must not embrace that which the legislature knows is beyond its power to accomplish. What it knows it cannot accomplish it is to be presumed it does not intend to attempt.

The opinion says: "If the courts could set aside statutes on the assumption of their emanation from ignorance, stupidity or corruption on the part of the legislature, the validity of every statute could be called in question, and there would be no certainty or stability in the law. In passing this statute, the legislature knew the limitations upon its powers and the constitutional rights of the railroad companies. It knew they were entitled to a hearing in the courts of the reasonableness of the rate and that it could not deprive them of it. Did it intend to do so? Evidence of such intent must be disclosed by express language in the act, to warrant an affirmative answer to the question."

Then the Judge cites numerous instances wherein alleged violations, coming within the letter of the law, were held to make of

the statutes absurdities, if enforced. He goes back to Blackstone's illustration of a barber bleeding a man in the street not coming within the act of parliament against the drawing of human blood; to that of a prisoner breaking out of jail to save his life from a prison on fire, not being within the statute making it a felony to break out of jail, and he says a corporation appealing to the courts against an unconstitutional statute is "metaphorically a fugitive from the fire of confiscation, or a vindicator of law or a surgeon relieving an abscess in the body politic."

The judge contends, that there is nothing objectionable in the way of recognizing what we may call an interregnum in the enforcement of these penalties, if thereby resort to the assertion of a constitutional right is made possible. Such kind of construction saves a statute, or tends to save it, in its entirety, with no question of separateness to be considered, while the other kind of construction either destroys or emasculates it, and it is the duty of courts to save a statute if possible.

It certainly seems as allowable for a legislature to contemplate such an interregnum as it is for a court to decree that there is one whether the legislature so intended or not. The Young case did decide, that the court could temporarily enjoin enforcement of rates, while their constitutionality was being inquired into. Assuredly, then, an interregnum is in legal conception, and, if so, the legislature may as well contemplate it, as a court.

Mr. Justice Brewer seemed to think, that after final adjudication upon validity excessive fines might not be considered confiscatory and we doubt very greatly whether their cumulativeness would be taken into account for any other reason than their being thus, while a *bona fide* appeal is being made to determine whether or not a rate is confiscatory. Divest these penalties of their cumulative character and they look very reasonable indeed, in comparison with fines for violations of other statutes, whether the offenses be *mala prohibita* or *mala in se*.

NOTES OF IMPORTANT DECISIONS.

STATUTE OF FRAUDS—POST-NUPTIAL ATTEMPTS TO VALIDATE ANTE-NUPTIAL AGREEMENTS.—In some jurisdictions contracts required by the Statute of Frauds to be in writing are otherwise void and in some, they are merely declared unenforceable. The Wisconsin Supreme Court in ruling that an oral ante-nuptial agreement could not be validated by a post-nuptial agreement in writing is careful to say that there is a distinction in this as to agreements which are void and those merely unenforceable, the former being those by Wisconsin statute. The court says: "How a void agreement which has no vitality whatever can be brought into force and vigor by another agreement made by the parties after they are disqualified to make the one which is void is not easy to understand. If this can be done, it is an easy way of avoiding the statute. If our statute were similar to the English statute of frauds and the statutes of the majority of the states which follow either literally or in substance the English statute, the proposition would be quite different. The English statute and most of the other states, except Wisconsin and New York, do not make the contract void, but provide, that, 'no action shall be brought * * * to charge any person upon any agreement made upon consideration of marriage,' etc. See *Kohl v. Frederick*, 115 Iowa 517, 88 N. W. 1055; *Frasier v. Andrews*, 134 Iowa, 621, 112 N. W. 92, 11 L. R. A. (N. S.) 593. But even under such a statute a similar ruling is that of the principal case has been made. *McAnulty v. McAnulty*, 120 Ill. 26, 11 N. E. 397, 60 Am. Rep. 552.

The court further says: "It is true that the statute does not provide expressly when the note or memorandum shall be made and signed and doubtless this might be done after the oral agreement was made and under such agreement valid where the relations of the parties had not changed and no rights intervened. Brown on Statute of Frauds, § 224. But it seems plain that after the parties became disqualified to make an ante-nuptial contract, they cannot by a post-nuptial agreement infuse life into an oral ante-nuptial agreement which never before marriage had any legal existence." Why may it not be urged, however, if the parties are disqualified after marriage, that also they are not able to infuse enforceability into an unenforceable contract? Such seems to have been the Illinois view.

THE VARIOUS FORMS OF COMMISSION GOVERNMENT.

A new experiment was made when the Texas legislature of 1901 granted Galveston a new city charter, substituting for the old, "commission government." The success of this municipal venture is undisputed in Galveston, and yet, some of our students of municipal affairs would maintain that the extraordinary conditions prevailing there, as an attendant economic state, brought about by the catastrophe, were largely responsible for the much heralded success of the "Galveston Plan." However this may be, developments since 1903, in other cities of Texas, and elsewhere, have well nigh proved to us that the peculiar conditions prevailing in Galveston at the time of the inauguration of the new system, were not responsible for that success.

The movement has spread rapidly and today we may say that this is a distinctive American type of city government. In short, Texas, Iowa, Kansas, Idaho, North and South Dakota and Oklahoma have adopted laws tending to reorganize municipal corporations so as to embrace the commission plan in one or more of its numerous forms. Even Tennessee passed a law which was declared unconstitutional. Wisconsin and Washington have considered bills bearing upon the subject.

The chief objects of this new method of government are: 1, to remove party politics from municipal elections; 2, to decrease administrative complexities which are constantly resulting from the general American policy; 3, to abolish the ward system; 4, to place the city finances upon a sound business basis; 5, to fix responsibility, in case of mismanagement. These objects are accomplished by having the city administration carried on by commissioners, usually five in number, who direct, control and are responsible for every department, and even the departmental executives.

Each city secured a special charter in Texas, with peculiar features. The original Galveston plan (1901) was declared uncon-

stitutional because the officials were partly elective and partly appointive. This effect was immediately remedied, and, in 1903, all offices were made elective. The charter provides for the assembling of the municipal functions in the hands of five commissioners who appoint the subordinate officers. This commission is elected at large by the people. The members must be 25 years of age and residents of Galveston for five years immediately preceding their election. The president of the commission is called the mayor. He is elected separately. Whenever necessary, the commission may compel the attendance of witnesses.

The commissioners are assigned to different departments, i. e., streets and public improvements, police and fire, waterworks and sewage, finance and revenue. The mayor is not assigned to any one department. This body of five men, sometimes called the board, determines the policy, has full power in the appointment of subordinates, except the chief of police and fire, whom the commissioner of fire and police appoints, and can remove any official upon written notice and upon giving such official opportunity to be heard.

The budget is made up a year in advance, based upon the estimates made by each member concerning the needs of his department. The law provides for a careful administration of the finances. No officer may be interested in a contract to which the municipality is a party. Bids must be called for on any proposal of \$500 or more. Detailed reports must be given each month by the treasurer, and a statement of all receipts and expenditures is published quarterly. The president of the board must report all financial transactions to the state comptroller at least once in six months. For all of this responsibility, the mayor receives a salary of \$2,000 per annum, while the other commissioners receive but \$1,200 each per annum.

The relations which these commissioners have with the city's administration may be likened to the duties of the ministers of the British cabinet. The superintendents

under them take over the managerial part of the work and direct the routine. The commissioners simply advise and direct. Yet, the board must meet weekly.

These general features were followed by the city of Houston. There is one noticeable feature, however, and that is this: That all powers remained in the state and the city merely enjoyed delegated functions. The clause reads: "The specification of particular powers shall never be construed as a limitation upon the general powers herein granted, it being intended to grant to the city of Houston full power of local self-government." It is difficult to predict how far this clause will lead the officials in developing a policy.

All cities having this form of government have abolished the ward system of election. All elections are from the city at large. Houston requires its elective officers to be owners of real estate, and also a five-year period of residence. The mayor fills all appointive positions. The council may reject his appointments, however. His veto power may be overruled; it extends to separate financial items of the budget which he prepares for the council's approval. An ordinance cannot be passed on the day it is introduced except it be an emergency measure. No financial measure is ever considered as an emergency measure.

Provision is made for the referendum upon petition of 500 voters or more, upon all matters of franchises and propositions for municipal purchases. The council has specific power to regulate public utility rates and build municipal plants. Members of the council cannot hold other public office during their incumbency; they cannot be interested in any city, school, state or county contract or public work, and any such contract is null and void, and the offending member may be removed from office by the mayor and the council. The council elects the city comptroller, directs and supervises finances, can examine the books of all quasi-public corporations for municipal purposes.

This new form of city government was likewise successful in Houston, and is prov-

ing more successful each day, although there were no extraordinary circumstances attendant upon its introduction. In 1907, the legislature of Texas granted new charters to Fort Worth, Dallas, Denison, El Paso and Greenville.

The general provisions for these cities seem to be about the same, varying in important details. There is a tendency to experiment with new methods, and it is too early to predict what the outcome will be. The laws prescribed for these latter cities all provide for the referendum on franchises and bond issues; most of them provide for the "recall" of the elective officers, or have some other way of getting rid of public officers other than on motion of the board. In all of these cities the commissioners are elected at large, and where party primaries are held, nominations must be at large.

El Paso's charter provides for the election of the judge of the corporation court, a treasurer, an assessor and collector of taxes, leaving the power of removal in the hands of the board upon hearing. Fort Worth's charter has an additional feature, namely, requiring that the commissioners shall be elected to take charge of designated departments. Thus, the voter knows what position each official will fill. In the Dallas plan the presidents of the banks nominate the auditor. All other officers are elected by the mayor and the council. In the smaller cities of Denison and Greenville, only two commissioners are elected. The mayor of Greenville acts as the judge of the corporation court and the city treasurership goes to the highest bidder.

In 1907, Iowa passed a law allowing cities to organize under the commission form. Des Moines, being the first city in Iowa to organize under this law, is often taken as the Iowa model and the plan is called the "Des Moines Plan." The law has this advantage over the Texan law in that the general enabling act provides that all cities over 25,000 may adopt the plan, thus insuring a uniform system all over the state, instead of allowing conflicting and perplexing provisions to arise in the

several cities. The Iowa law is so good that it is deserving of some consideration in detail.

The first three sections are general, providing for biennial elections of the mayor and the councilmen, the manner of election, and a non-partisan primary. Candidates' names are placed on the ballot on petition of 25 per cent of the voters, the two highest candidates being placed on the ballot. Penalties are imposed for bribery during elections and for violation of the election laws.

Power to govern the city is provided in section 6. A majority vote is necessary to pass a measure.

Five departments are created, namely, 1, public affairs, with the mayor exercising direct supervision; 2, accounts and finances; 3, public safety; 4, streets and public improvements; 5, parks and public property. One member of the council presides over each of the other departments, and the council determines to what department each councilman shall be assigned, except the department of public affairs. The council elects by majority vote the necessary officials to administer the departments. (Secs. 7 and 8.)

A sliding scale is provided for the salaries of the mayor and the councilmen according to the size of the city, ranging from \$2,500 for the mayor and \$1,800 for the members of the council in cities from 25,000 to 40,000, to \$3,500 for the mayor and \$3,000 for the members of the council in cities over 60,000. (Sec. 10.)

Every ordinance, contract, etc., must be open to public inspection for 7 days prior to its final passage and does not go into effect until 10 days after its passage; if, during these days, 25 per cent of the voters petition for the referendum, the council must submit the question to a vote. All franchises to public service corporations must be submitted to the vote of the people for approval. (Sec. 12.)

Direct or indirect interest in public service corporations is prohibited on the part of city officials or employees. A civil ser-

vice commission is provided for, and the methods of procedure for such commission are prescribed. Complete publicity in all city affairs is provided for, i. e., monthly statements of receipts and expenditures are to be published—an annual examination and audit. Iowa has just established a system of uniform municipal accounting, based upon schedules provided by the census bureau at Washington. This new law will aid the cities of Iowa in securing better accounting methods, and especially those cities that have adopted or are contemplating the adoption of the commission form of government. (Secs. 13, 14 and 15.)

Upon petition of 25 per cent of the voters a special election must be called at which the person against whom the "recall" is aimed must stand for re-election. The initiative is established in the code, by which the people can compel the council to pass needed ordinances. Upon petition of 25 per cent of the voters the council must pass the ordinance in question, or, refer it to popular vote. (Secs. 18 and 19.)

If after 6 years, the system proves unsatisfactory, the people can vote to return to the old system. (Sec. 20.)

The "Des Moines Plan" is the most advanced form of commission government ever put into operation. It is representative—the people have an absolute check upon administration of city affairs—it makes it possible for the people to assert their rights at any juncture. They control, absolutely, their representatives. This is one of the objections to the Galveston plan. In Des Moines, responsibility is fixed. Salaries are sufficiently high to insure good service from those who are willing to devote their time to the work of honest, sane and sober city government.

Lewiston and Boise have charters in Idaho. The Lewiston charter provides for six aldermen and a mayor, who have the power of appointment and removal of other officers, except the comptroller, who is elected for a period of two years, and cannot be removed unless for cause, after a hearing. The recall and the referendum are provided for; franchises are limited to 25 years,

and must be referred to the voters upon petition of 300 citizens; the city may acquire property at the expiration of any franchise without making payment for anything above the physical value; no ordinance may be passed upon the day of its introduction, unless such measure be deemed an emergency measure.

Boise has made provision in its charter that no party emblem shall appear on the ballot at any municipal election; vacancies in the council are filled by the council itself until the next regular election. Special elections are not held. The finances are carefully guarded, and no expenditure for supplies, in excess of \$100, can be made unless sealed bids are first submitted. Franchises are likewise limited to 25 years; and from 2 to 5 per cent of the gross receipts must be paid to the city. No franchise can be renewed until within the last year.

South Dakota has a general law applicable to all cities which shall vote to adopt the commission form of government. This law follows the Galveston plan; the mayor has no veto power; and the board may remove any officer. Nomination petitions for a primary election must be signed by 15 voters for every 1,000 of the population. The law provides for the initiative, the referendum and the recall. Franchises are limited in the same manner described above, and the referendum clause is compulsory. The recall is made applicable to school directors as well as other elective officers. Contrary to the usual practice in other cities with this form of government, the appointive officers are given a definite term of one year. Provision is made, however, so that they may be removed at any time.

The Kansas law is applicable to cities of the first class. It is worth while to note in this connection that the mayor is the active head of a department of the city in only Iowa and Kansas. The laws of Idaho, Kansas, North and South Dakota and Oklahoma, is short, provide various groupings of the provisions embraced in the various laws described.

It is perhaps worth while to give passing note to the provisions of the "Newport

plan," championed by Admiral Chadwick before the Norfolk convention of the League of the American Municipalities. The new charter became effective in January, 1907, and was adopted by a very considerable majority of the citizens. The system follows the organization of the English corporation and embraces the New England township plan in some of its features, the representative council taking the place of the open meeting and the mayor and the aldermen taking the place of the selectmen.

There are a large number of people in the governing body, while the commission form aims at concentration. The council is composed of 195 men who control legislation. The mayor and five aldermen have charge of the executive branch; the initiative and referendum are provided for; and the usual provisions concerning the interest of city officials in city contracts is provided.

Admiral Chadwick advocates the largest possible widening of citizenship in order to give the citizens an active and constant participation in public affairs. He argues that this the Galveston plan does not do, yet he admits that this defect is largely remedied in the Des Moines plan. He deems it inexpedient to unite the executive and legislative branches into one body, because he believes that it will lead to the formation of vicious rings. He says that the Galveston plan is a return to mediaevalism. All of his arguments against the system of commission government lose most of their force because the evils of which he complains have been removed to a large extent.

I have cited the Newport plan to illustrate the fact that our American cities are constantly on the alert to devise some newer and better form of city government. Dissatisfaction exists with respect to conditions in city government, and Newport believes that it has solved the problem. Certainly, the first year's trial of the new plan has met with the undeniable approval of the citizens.

The subject of commission government is in its embryonic state, and it is impossi-

ble to discuss the merits of the system outside of Galveston and Houston perhaps. In these cities the system has been in operation long enough to warrant our stating that it is proving successful. All other cities that have adopted the plan have done so within the past year. The final success of the plan depends upon the checks which are imposed upon the city officials.

The Galveston plan was given birth at the time of a great civic need—when the best that there was in the city would naturally assert itself. However, I am prone to attribute the success of the plan to the merits alone. Galveston is now reaping the benefits of five years of clean administration. She was desperate and bankrupt in the hands of grafters; now she has credit. Good government proved to be a strong agent in the uplifting of the city.

Houston's conditions were not alarming—they were not clamorous or dramatic at the time the system was introduced, simply normal, with official incompetency and corruption on every hand. The success of the Galveston plan attracted the citizens of Houston. The police department, for example, was reorganized on the merit basis instead of being subject to political pull, as had been the case formerly. It is enough to quote from American Municipalities in its comments on the report of Houston's mayor: "What will most appeal to the people in the message of the mayor and the reports of the department heads is the splendid vindication of the commission form of government. * * * It is clear now that the elimination of politics and the conduct of the business of the municipality upon business principles was what the city needed right along."

The various forms of commission government aim to make office-holding attractive to the competent man and to remove hampering restrictions which usually surround city officials. The ward system has been abolished, and instead of ten or twelve aldermen in cities like Galveston and Houston, we find only four, elected by the city at large.

Des Moines and Cedar Rapids held their first elections this spring. The law was carried to the Supreme Court and every possible objection was raised by the opponents of the plan. It was claimed to be unconstitutional because it combined legislative, executive and judicial functions in one body; because it gave legislative power to the people through the initiative, the referendum and the recall, because it was not uniformly operative; and because voters were deprived of essential rights. The law was upheld without a single dissenting opinion.

We are looking to the Iowa officials to demonstrate the success of their plan, which is the most advanced. Public sentiment will turn for or against the plan as a result of the success or failure of the Iowa experiment. There seems to be no reason why the plan should not materialize and result in much good.

The reason why the initiative, the referendum and the recall have not met with American approval is because of the lack of confidence on the part of the voters, in city officials, and because the systems in vogue have not tended to inspire interest in municipal government. I do not wish to appear to contradict those authorities upon these three innovations in city government, who maintain that they will never be successful. However, I do believe that all judgments which have heretofore been given concerning the initiative, the referendum and the recall have been based upon a hasty judgment of peculiar local conditions. The success or failure of them will depend upon the working out of the commission plan.

Commission government is a new thing. It has not yet passed through its critical stage. Judging, however, from the successful experiments which have already been made in a number of cities, and from the agitation which is now current in more than forty cities, it is safe to predict that this form of city government is destined to become a fixture with us for some time to come.

DON E. MOWRY.
Milwaukee, Wis.

COURTESY—ESTOPPEL.

JAMISON v. ZAUSCH.

Supreme Court of Missouri, Division No. 2,
March 31, 1910.

A deed making a husband and wife second and third parties, respectively, conveyed property to the husband in trust for the sole and separate use of the wife, her heirs and assigns, entirely free from all control, as well as the estate by courtesy, of the husband, and provided that, on the death of the wife, the husband should convey all interest in him in the property according to the provisions of the wife's will. Held, that it was the intention of the grantors to wholly deprive the husband of his right of courtesy, and that, having accepted the trust, he was estopped from claiming on the wife's death any interest adverse thereto.

BURGESS, J.: This is a suit to partition two parcels of ground in the city of St. Louis, at the southeast corner of Prairie and Easton avenues. Plaintiff is the widower of Mary Jamison, to whom he was married in 1865, and who at the time of her death was the owner of the two parcels sought to be partitioned. One, the larger parcel, was acquired from Claude Kilpatrick and wife by deed dated October 18, 1888; the other from William G. Ashby, by deed dated June 4, 1904. The said Mary Jamison died on the 29th day of January, 1906, leaving a will which was duly probated in the probate court of the city of St. Louis on the 31st day of January, 1906, wherein and whereby she nominated and appointed her nephew, Henry Louis Zausch, defendant herein, as executor, authorizing him to take charge of said real estate, to collect the rents therefrom, and, after the payment of her debts and the expenses of administration, to pay not less than \$30 monthly to her husband, the plaintiff, during the administration of her estate; and also appointed the defendant Mercantile Trust Company as trustee, with power to hold, manage, and control all the rest and residue of her estate, and to pay four-fifths the income thereof to the plaintiff during the period of his life, and the remainder of the income to defendant Hanora Zausch, sister of the testatrix, the remainder in fee of said trust estate, after the expiration of said life estate, to go to said Hanora Zausch, her heirs and assigns, forever.

The deed from Claude Kilpatrick and wife was as follows: "This deed, made and entered into this 18th day of October, 1888, by and between Claude Kilpatrick and Dolly L. Kilpatrick, his wife, of the city of St. Louis, state of Missouri, parties of the first part, and Jesse Jamison, party of the second part, and Mary Jamison, of the same place, party of the third

part, witnesseth: That the said parties of the first part, for and in consideration of the sum of forty-five hundred dollars, to them in hand paid by the said party of the third part, the receipt of which is hereby acknowledged, and the further sum of one dollar to them paid by the said party of the second part, the receipt of which is also hereby acknowledged, do by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, his heirs and assigns, and his successors in trust forever, the following described real estate, situated in the city of St. Louis, state of Missouri, to-wit: [Then follows a description of the property conveyed.] To have and to hold the same, together with all and singular the privileges and appurtenances thereunto belonging or in anywise appertaining, unto the said party of the second part, his heirs and assigns, and to his successors in trust forever. In trust, however, for the sole and separate use, benefit and behoof of the said Mary Jamison, her heirs and assigns, and entirely free from all control, restraint or interference, as well as the estate by courtesy and all debts of her husband. The said Mary Jamison to have, hold, to use, occupy, and enjoy the exclusive and undisturbed possession of said real estate and the appurtenances thereunto belonging, with power to direct the sale or lease or other disposal of the same at her will and pleasure, and to receive to her own separate use and benefit the proceeds of such sale and all rents and profits arising or accruing from the lease or other disposal of the same, the said party of the second part holding said real estate subject at all times to the direction in writing under her hand and seal without the intervention of her husband, of the said Mary Jamison, her heirs and assigns, as to the disposal of the said real estate, whether by lease, conveyance in fee, mortgage, assignment, or transfer of this trust or otherwise. Upon the decease of said third party said trustee shall and will convey all interest yet in him in said real estate in accordance with the said will of the said third party; but, in case said third party should leave no will, then said trustee shall and will convey the said real estate to the legal heirs of said third party. And the said Mary Jamison shall have power at any time hereafter, whenever she shall from any cause deem it necessary or expedient, by an instrument in writing under her hand and seal, and by her acknowledged, to nominate or appoint a trustee or trustees in the place and stead of the party of the second part above named, which trustee or trustees, or the survivor of them, or the heirs of such survivor, shall hold the said real estate upon the same trust above recited; and upon the nomination and appoint-

ment of such new trustee, the estate in trust hereby vested in said party of the second part shall thereby be fully transferred and vested in the trustee or trustees so appointed by the said Mary Jamison." This deed was signed and acknowledged by the said grantors on the 5th day of November, 1888.

The deed from William G. Ashby to Mary Jamison, of date the 4th day of June, 1904, was a regular warranty deed without the intervention of a trustee. It conveyed a lot adjoining that conveyed by the Kilpatrick deed.

At the trial plaintiff testified that he had not paid anything for the deed from the Kilpatricks, and that there was an arrangement between him and his wife that he was to be made trustee in the deed. He also stated that he had signed as trustee, although the deed shows that it was not so signed by him. The evidence shows that there was no issue born of the marriage of plaintiff and Mary Jamison deceased, and that she had at the time of her demise no descendants in being capable of inheriting.

Upon the above evidence the court found that plaintiff was entitled, under section 2938, Rev. St. 1899 (Ann. St. 1906, p. 1694), to an undivided one-half interest in the property acquired by Mrs. Jamison from William G. Ashby, and that he was entitled to partition thereof; but, as to the property acquired from Claude Kilpatrick and wife, the court held that plaintiff had no interest therein, excepting that given to him by the will of his wife, and that as to that interest he was not entitled to partition. Judgment was entered accordingly. After an unsuccessful motion for a new trial, plaintiff appealed to this court.

The sole material question on this appeal is whether the deed from Kilpatrick and wife deprived the plaintiff of the interest which he claims under the provisions of the act of 1895 (section 2938, Rev. St. 1899), which reads as follows: "When a wife shall die without any child or other descendants in being capable of inheriting, her widower shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, absolutely, subject to the payment of the wife's debts." In construing the terms of deeds creating separate equitable estates in the wife, this court has uniformly based its conclusions upon what it found to be the intention of the parties, as ascertained from the language employed in the instrument. The rule is that if the grant or devise be to the wife for her separate use, and it clearly appears from the conveyance or will that it was the intention of the grantor or devisor that the husband should not be tenant by the curtesy, this intention will govern, and the

husband will not be entitled to curtesy. Tyler on Infancy and Coverture (2d Ed.), p. 431; 1 Washburn on Real Prop. (6th Ed.), sec. 321, p. 147; McTigue v. McTigue, 116 Mo. 138, 22 S. W. 501; McBreen v. McBreen, 154 Mo. 323, 55 S. W. 463, 77 Am. St. Rep. 758; Woodward v. Woodward, 148 Mo. 241, 49 S. W. 1001. We think that the terms of the deed in question make it very clear that it was the intention of the grantors to wholly deprive the plaintiff, husband of Mrs. Jamison, of his right of curtesy in the land conveyed.

In the McTigue case, *supra*, the deed under which both parties claimed was in its terms very similar to the Kilpatrick deed, except that the trustee named therein was not the husband of the beneficiary, as in this case. It was held in that case that by the terms of the deed an equitable estate of inheritance was vested in the wife, which, upon her death intestate, descended to her legal heirs, free from the curtesy of her husband.

In the McBreen case, *supra*, the court said: "Indeed, it is the prevailing doctrine in England and the United States that it is not competent at common law, in a grant to a woman of an estate of inheritance, to exclude her husband from his right of curtesy; but it is equally well settled that in equity an estate may be so limited as to give the wife the inheritance, and by words clearly denoting that intention to exclude and deprive the husband of curtesy"—citing Tiedeman on Real Prop. (2d Ed.), sec. 105; 1 Washburn on Real Prop. (5th Ed.), p. 176, sec. 15; McTigue v. McTigue, 116 Mo. 138, 22 S. W. 501; Grimal v. Patton, 70 Ala. 635; Rigler v. Cloud, 14 Pa. 361; Pool v. Blakie, 53 Ill. 495; Haight v. Hall, 74 Wis. 152, 42 N. W. 109, 3 L. R. A. 857, 17 Am. St. Rep. 122.

The plaintiff rests his case principally upon the authority of O'Brien v. Ash, 169 Mo. 283, 69 S. W. 8. But that case is essentially different from the case at bar. The deed construed in that case was also a conveyance to a trustee for the sole and separate use of the wife free from the husband's curtesy, and it was held that the deed undertook to cut off the marital rights of only her then husband, and not of any future husband she might have. The husband referred to in the deed having died, the court held that the trust thereupon ceased and terminated, and the use became executed in the beneficiary, and did not thereafter, upon the remarriage of the beneficiary, revive and revest in the trustee. After so construing the deed, the court adds: "In this view of the case, it is unnecessary to discuss whether the act of 1895 could affect property held by a woman, married or unmarried, under a deed of settlement so formulated as to create a separate equitable estate to the ex-

clusion of all marital rights of any future husband." In that case the court also said: "So long as plaintiff's wife was alive to enjoy the use of her property, it belonged to her, free from legislative interference, and the act of 1895 could have no effect or influence upon it, or of her use or disposition of it whatever; but when death came, and she could no longer enjoy it, her acquisition ceased, and with it the right to direct its future use and ownership only as the legislative will was indicated by the statute then in force upon that subject."

Plaintiff's right of courtesy was not, of course, affected or impaired by his wife's will, but rather by the deed to which he was a party. In the O'Brien case the husband was not a party to the deed, and simply accepted his statutory right. The fact that plaintiff was a party to the Kilpatrick deed is a most material fact, and makes the case entirely different from that of O'Brien v. Ash, on which plaintiff relies. Had Mrs. Jamison died intestate, plaintiff's right of courtesy would still be barred, for he covenanted in the deed to convey to her legal heirs in case she made no will. The words of the deed are: "Upon the decease of the said third party, said trustee shall and will convey all interest yet in him in said real estate in accordance with the said will of the said third party; but in case said third party should leave no will, then said trustee shall and will convey the said real estate to the legal heirs of said third party." It is true that the deed from the Kilpatricks does not show that plaintiff signed the same as trustee, but it has never been held that a trustee named in a deed of trust can accept the trust in no other way than by signing his name to the deed. He testified that there was an arrangement between his wife and himself that he was to be made trustee in said deed, and he further stated that he signed as trustee; so that he was evidently under the impression that he had signed it. In view of these admissions, and the fact that he and his wife entered into possession of the property under the terms of the deed, and the further fact that he never made any disclaimer, by word or act, after a lapse of 18 years (the deed having been executed in October, 1888), we must hold that plaintiff accepted the trust.

In Salter v. Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249, it is held that the fact that a party permits the title to property to be vested in him, as trustee, without objection, makes him a trustee.

In Roberts v. Moseley, 64 Mo. 507, it is said: After a lapse of years the acceptance of the trust may be presumed, even when no act has been done by the trustee to indicate an ac-

ceptance. In the case at bar there was no act for the trustee to perform. His duty, under the deed, was simply to permit the beneficiary, Mrs. Moseley, to have the use and occupation of the land, and, if he had never exercised any control over the property whatever, the fact that he knew of the execution of the deed, and procured a copy for his own use, would amount to an acceptance, in the absence of a disclaimer, by word or act, after a lapse of six years." Again, in Brandon v. Carter, 119 Mo., loc. cit. 582, 24 S. W. 1037 (41 Am. St. Rep. 673), this court held that, while acceptance of a trust is necessary to the vesting of title in the trustee, such acceptance "may often be implied or established by inference."

We are of opinion that the plaintiff is estopped from claiming an interest adverse to the trust under which he held title, and by the terms of which he covenanted to convey all interest yet in him to his wife's devisees.

In Heisen v. Heisen, 145 Ill., loc. cit. 665, 34 N. E. 598 (21 L. R. A. 434), the Supreme Court of that state said: "The husband being sui juris, and the (husband's) right of dower conferred by the statute not having been trammeled, or hedged about by rules of law growing out of the disability of married women at common law, no reason exists why he may not release his inchoate expectancy, or his right of action for dower, or bar recovery in respect thereof, as he might release or bar any other expectancy or right. And it would necessarily follow that the husband would be barred of his right to assert dower in the lands of his deceased wife by any act or conduct that would estop him from the assertion of any other right."

Crum v. Sawyer, 132 Ill. 443, 24 N. E. 956, was a case where the husband executed to his wife, upon a valuable consideration, an instrument under seal, by which he released his dower interest, and also covenanted with her and her legal representatives not to assert said right in case he should survive her. The court said: "If, then, it should be held that a release of dower by a husband directly to his wife, is, by reason of their relation, ineffectual as a conveyance, there is no reason why his covenant with her and her representatives not to claim or assert dower should not operate by way of estoppel to bar him of that right."

This court, in McBreen v. McBreen, supra, applied the doctrine of equitable estoppel, and denied the claim of the husband to courtesy in his wife's real estate, where they had entered into a contract with each other, which recited that "the said parties hereto shall be absolved from any and all obligations toward each other by reason of their relation as hus-

band and wife, and the said parties hereto hereby release each other from any and all obligations by reason thereof." The covenants in the agreement were acted upon and carried out by both parties until the wife's death. The court said that such contract was not enforceable at law, but nevertheless held that the husband was estopped, by the terms of his own deliberate and solemn covenants, from claiming possession of his wife's property as tenant by the curtesy.

The judgment is affirmed. All concur.

Note.—Construction of Terms Excluding Curtesy, as Relating to Grantor or Nature of Instrument Creating Separate Estate.—The trend of American decision seems not so much to exclude courtesy because of a wife's separate estate being either legal or equitable in character, but it would seem that, if the estate is created or caused to be created by the husband, there is a difference arising as expressed by Virginia cases hereinafter cited out of the nature of the transaction. The intent to exclude must be very clear, where the separate estate is created by a stranger. We think this distinction is clearly shown forth in the cases we refer to in this note. We set forth first the purport of the cases cited by the principal case.

In the Haight case, *supra*, the conveyance was directly to the wife, the habendum clause specifying "to her sole and separate use, free from the interference or control of her said husband, or any husband, and her heirs and assigns, to her and their only proper use and benefit forever." The court held these words cut off courtesy, not taking into view anything but the grantor's intent, though the estate created be merely a legal, as contradistinguished from an equitable, estate.

In the Grimball case, where devise was to executors in trust "for the sole and separate use," etc., it was said: "His marital rights never having attached," during the wife's life, "by reason of the words of exclusion in Dr. Moore's will, they cannot, under our rulings, attach after her death." This was put on the ground of these rulings referring to equitable estates. Old prior cases are cited.

In the Rigler case there is no discussion and it is said: "Rigler has not the shadow of interest as tenant by the curtesy. The clause in the deed made by him to Catharine George, in trust for his wife, effectually shuts him out. That clause is as follows: 'To the use and benefit of Maria Rigler (wife of the said Henry Rigler) and her heirs forever, so that the same shall not be subject in any wise to the future control, debts or liabilities of her present or any future husband.' It (the deed) conveys an estate for her sole and separate use, free and clear of all claims, incidents or liabilities consequent upon the marital state." Inasmuch as the grantor was the claimant of courtesy the estoppel applied in the principal case might have sufficed for the conclusion. Nothing, however, was said about legal or equitable estates.

Chavis v. Chavis, 57 S. C. 173, 35 S. E. 507, is a good example of the necessity of husband's interest being cut off only by words of plainest import, and is against our observation above.

The granting clause gave premises to grantee "upon the following conditions: that my said daughter (grantee) shall hold and enjoy said lands during her lifetime and after her death to go to all her children. The same to be in no wise subject to the debts, contracts and engagements of her present husband or any husband she may hereafter marry; and also upon the express condition that my said daughter shall * * * support * * * me during my lifetime." The habendum clause is to "Sarah Chavis, her heirs and assigns forever." The court said: "The attempt to exclude the husband only resulted in creating a separate estate in the wife over which the husband had no control during her lifetime." His third was held not affected. It was said "it was her (grantors) uppermost thought to convey away from herself the fee simple and to vest it in her daughter." The provision about support was merely a condition subsequent.

In *Staffan v. Zeust*, 16 App. D. C. 141, Chief Justice Alvey spoke of a deed under a power and direction by the husband, conveying to the wife "in fee simple absolute for her sole use and benefit, free from the control and ownership of the husband" as cutting off all right of courtesy, while another merely conveying an estate without embracing such words, leaves the estate subject to courtesy. The next two cases show Virginia doctrine is to eliminate all view, whether or not the estate is either legal or equitable.

In *Jones v. Jones*, 96 Va. 749, 32 S. E. 463, it was held that by the very fact of the husband creating an equitable separate estate, i. e., one granting powers or imposing restrictions not granted or imposed by the statutes, his right to courtesy is cut off. It was said: "A husband, if he survives his wife, and the common law requisites exist, is entitled to courtesy in any real estate held by her as her equitable estate which may remain at her death undisposed of by her during coverture or by will under a power vested in her to that effect. * * * Where the estate is created by a stranger, the intention to exclude must be plain and unequivocal. * * * But where the equitable estate is created by the husband, the intention to exclude is presumed, or results from the transaction itself, except so far as he may have reserved his marital rights in the instrument creating the equitable estate." The entire reasoning shows this presumption applies only to a conveyance by him creating an equitable estate.

In *Ratliff v. Ratliff*, 102 Va. 880, 47 S. E. 1007, the Jones case is approved, and it is said: "We are of opinion that the reasons given in the Jones case for excluding the husband from courtesy in the equitable separate estate which he has created, with equal force deny his right to courtesy in lands that he has conveyed or caused to be conveyed to her, without reservation of his marital rights, where such lands constitute, as in the case at bar, a statutory separate estate," a decision showing a distinct extension of the Jones case.

Pennsylvania seems also to have long before arrived at this point.

In *Morton's Estate*, 24 Pa. Sup. Court 246, it was said as to an estate which under a devise was "for the purpose of preserving the

estate in its entirety and insuring the payment of the income until the death of his last surviving son or daughter" and then going in remainder to their children, "the estate of Birdella Longdon (one of the children) was a fee, whether legal or equitable, matters not, as in either case, in Pennsylvania, courtesy attaches as an incident," citing authority.

One of these authorities is *Ege v. Medlar*, 82 Pa. 86. There is expressed the same principle and in addition it is said: "Unless there is something in the grant which clearly exhibits an intent to exclude the husband's right, equity will not interfere to annul the legal intendment. We discover no such intent in the deed before us. The expressions therein contained, such as 'for the purpose of promoting the interest of said Elizabeth, separate and apart from her husband' and 'to and for her and their sole and separate use and benefit' are but the ordinary terms used in such instruments, and import no intention to strip the husband of his courtesy." The opinion then goes on to speak of the duties of the trustee as "purely passive except he might be directed to sell by the wife, but, even in that event, he could not control the disposition of the proceeds."

In Oregon the estoppel theory would seem not to prove effective, though it might be said that the following case does not necessarily foreclose this question.

In *McCravy v. Biggers*, 46 Ore. 465, 81 Pac. 356, 114 Am. St. Rep. 882, the husband sued in ejection as owner of courtesy in the premises and defense was made that he was estopped by an agreement with his wife that her devisee should take unaffected by his courtesy interest and that qualifying as executor he put devisee in possession. The court sustained a demurrer to this defense on the ground of its having been held by that court "that when a husband or wife owns property in his or her own right, any inchoate right the other may have therein, such as tenant by the courtesy or dower, cannot be the subject of a valid contract between them."

Wood v. Reamer, 118 Ky. 841, 82 S. W. 572, showed a deed in pursuance to an antenuptial contract by which the property owned by the wife at the time of her marriage should be conveyed "in trust for the sole and separate use of said wife during her life," and if she died intestate to be conveyed to the descendants of said wife." The husband's courtesy was held excluded, because such an intent "is usual in such contracts," strongly implying that the nature of the instrument only, and not such words excluded it. Here again we see an ignoring of any difference between legal and equitable estates.

C.

JETSAM AND FLOTSAM.

ABOLISHING LIFE TENURE OF FEDERAL JUDICIARY.

To the Editor of the Central Law Journal.

In the Central Law Journal for April 8, 1910, you publish the appeal of the members of the bar of a so-called "committee on federal judges' salaries," which advocates the enactment by congress of a bill to increase their present compensation, and with which proposal you state you heartily agree, upon the condition "the

life tenure for district and circuit judges" be abolished and terms of ten years be substituted in lieu thereof.

At present, all federal judges hold office "during good behavior," popularly spoken of, as you have spoken of it, as a life tenure. One of the reasons leading you to oppose this as to all such judges below the rank of a justice of the Supreme Court, is because the method of removal by impeachment is "often an impossible remedy," no lawyer desiring to become a prosecuting witness.

The adjective "impossible" seems hardly well chosen, but, passing that by, you fail to point out in your advocacy of the slogan, "abolish the life tenure," the difficult task confronting those who may attempt it. The fact that the present tenure—during good behavior—is constitutional, and cannot be changed except by an amendment to the federal constitution, obviously makes your proposal of a fixed term so great an undertaking that the use of the word "impossible" would be more appropriate in this connection than the use you have made of it. As a matter of fact, neither undertaking is impossible, if desired by those having its determination entrusted to them. Moreover, your exception of the Supreme Court Justices from the proposed change of tenure undermines most of the objections you have urged against the enactment of the bill.

Admitting, as you subsequently do, that the present scale of compensation is inadequate, and recognizing, as you must, that to "abolish the life tenure" is something which you can hardly hope to see accomplished within a generation, would it not be the better part of wisdom for the editor of the Central Law Journal to lend whatever influence he may be in a position to exert in favor of the committee's proposal?

THOMAS R. BEMAN.

Chicago, Ill.

[We stand always ready to publish any criticism as well as any commendation of our work, especially when presented so fairly as in Mr. Beman's argument.

We are, of course, not infallible. We may err and frequently go further or not so far as our readers may wish us to go.

Several lawyers have expressed their approval of our position in regard to the federal courts. This is the first note of disapproval, and so we publish it.

We say again, as we said in our comment on the committee's recommendation for increase in salary of federal judges, that we favor it, and favor it heartily. Federal judges are shamefully underpaid, and the increase asked is very moderate and should be granted.

But we cannot by any effort of our imagination understand why we should not link our hearty approval of this proposed bill a suggestion that to our mind will serve to increase the prestige of our federal judiciary as well as their salaries.

Moreover, we did not think our suggestion was ill-timed in view of the fact that there is pending in congress to-day a bill to submit a constitutional amendment for the abolishment of the life tenure of federal judges.

Let both be done.—Editor.]

HUMOR OF THE LAW.

Against an old Georgia negro, charged with stealing a pig, the evidence was absolutely conclusive, and the judge, who knew the old darky well, said, reproachfully:

"Now, uncle, why did you steal that pig?"

"Bekase mah pooh family wuz starvin', yo' honoh," whimpered the old man.

"Family starving!" cried the judge. "But they told me you keep five dogs. How is that, uncle?"

"Why, yo' honor," said uncle, reprovingly, "you wouldn't 'spect mah family to eat dem dogs."

WEEKLY DIGEST.

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1. Accident Insurance—Voluntary Exposure.—"Voluntary Exposure" to unnecessary danger or obvious risks, within the meaning of an accident policy, is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one.—Continental Casualty Co. v. Deeg, Tex., 125 S. W. 353.

2. Account Stated—Nature.—An account stated is an admission of a sum of money being due from the defendant to plaintiff.—Lyell v. Walbach, Md., 75 Atl. 339.

3. Action—Right of Surviving Partner.—A surviving partner takes the property as its absolute owner, though liable to account for its proceeds, and so his own debts and demands, and those due to or from the late firm may be joined in a single action.—Hewitt v. Hayes, Mass., 90 N. E. 985.

4. Assignments for Benefit of Creditors—Rights of Assignee.—The assignee for the benefit of creditors is an officer of the court, and may apply thereto for any order which he may desire made in the administration of the trust.—Cuddy v. Becker, Mayer & Co., Iowa, 124 N. W. 1071.

5. Bailment—Negligence.—A bailor who grounds his action against the bailee in negligence has the burden of proving negligence.—Freeman v. Foreman, Mo., 125 S. W. 524.

6. Bankruptcy—Adjudication.—An adjudication in bankruptcy on July 16th transferred to the assignee in bankruptcy the indebtedness of a garnishee to the bankrupt, sought to be reached by a garnishment writ in a state court served on July 10th, so that judgment could not thereunder be rendered against the garnishee.—Wright-Dalton-Bell-Anchor Store Co. v. Sanders, Mo., 125 S. W. 517.

7. Equitable Lien.—The claim of a bankrupt's wife to an interest in or lien upon land of the bankrupt, on the ground of having con-

tributed to its purchase money years before, held not sustained by the facts, as against her husband's creditors.—In re Teter, U. S. D. C., N. D. W. Va., 173 Fed. 798.

8. Exemptions.—The decision of a federal court approving the action of appraisers appointed in bankruptcy proceedings to set apart the bankrupt's homestead held not subject to collateral attack as to the value of the homestead set aside, in absence of fraud or mistake.—Morton v. Jones, Ky., 125 S. W. 247.

9. Liens.—Under Bankr. Act the holder of a valid mortgage on property of bankrupt, which is sold by the trustee free from the lien, is entitled to full payment from the proceeds, with interest to the time of sale.—In re Stevens, U. S. D. C., D. Oregon, 173 Fed. 842.

10. Partnership Estate.—A trustee in bankruptcy of a surviving partner held entitled to sue the executors of his deceased partner for firm assets and property which have come into their hands.—Hewitt v. Hayes, Mass., 90 N. E. 985.

11. Pending Litigation.—Where defendant in a suit for patent infringement became a bankrupt after judgment, it was not entitled to a stay of proceedings for an accounting before the master.—In re Leeds & Catlin Co., U. S. D. C., S. D. N. Y., 175 Fed. 809.

12. Selection of Trustee.—Votes or proxies solicited by the bankrupt's counsel may be rejected by the referee as being manifestly in the interest of the bankrupt.—In re Van de Mark, U. S. D. C., W. D. N. Y., 175 Fed. 287.

13. Banks and Banking—Forged Check.—A depositor's delay in notifying a bank of a forged endorsement of a check after discovery was no defense to an action to recover the amount thereof unless the bank was injured thereby.—Pratt v. Union Nat. Bank, N. J., 75 Atl. 313.

14. Payment of Forged Check.—A bank cannot cash a check drawn on it knowing that the signature thereof is not that of its purported maker, and then hold the indorser for collection for the amount.—National Bank of Rolla v. First Nat. Bank, Mo., 125 S. W. 513.

15. Bills and Notes — Payment of Forged Check.—Under Negotiable Instrument Act 1905 (Laws 1905, pp. 251, 364 [Ann. St. 1906, §§ 463-62, 463-188]), §§ 62, 188, where a bank pays a forged check drawn on it the indorser is released from liability.—National Bank of Rolla v. First Nat. Bank, Mo., 125 S. W. 513.

16. Boundaries—Admissibility of Evidence.—In an action to restrain trespass upon land and obstruction of a water course plats of unofficial surveys were admissible to establish the boundary line of the land.—Baldwin v. Fisher, Minn., 124 N. W. 1094.

17. Carriers—Delay in Transportation.—The carrier delaying the transportation of property has the burden of showing a special excuse.—McMillan v. Chicago, R. I. & P. Ry. Co., Iowa, 124 N. W. 1069.

18. Live Stock Shipment.—The carrier's liability for live stock shipped contracting Texas fever held to defend on negligence in exposing stock to the disease.—Baltimore & O. R. Co. v. Dever, Md., 75 Atl. 352.

19. Live Stock Shipment.—That a shipment of cattle was interstate would not, independent of other issues and evidence, in a suit against connecting carriers for damages, render all

jointly liable for injuries sustained on one line only.—Missouri, K. & T. Ry. Co. v. Gober, Tex., 125 S. W. 382.

20. **Commerce—Employer's Liability Act.**—The federal employer's liability act held to supersede state laws in so far as they relate to liability of railroads while engaged in interstate commerce for injuries to employees similarly engaged.—Dewberry v. Southern Ry. Co., U. S. C. C., N. D. Ga., 175 Fed. 307.

21. **Constitutional Law—Parole of Prisoners.**—Where accused accepted a parole under Rev. St. 1899, sec. 2818 (Ann. St. 1906, p. 1623), he could not object, on being rearrested, that so much of the statute as authorized his rearrest and incarceration without a hearing, was unconstitutional.—State v. Collins, Mo., 125 S. W. 465.

22. **Contracts—Acceptance.**—A written agreement executed by one party does not take effect as an agreement, when the other party, or an agent in its behalf, does not accept it.—Laprade v. Fitchburg & L. St. Ry. Co., Mass., 90 N. E. 982.

23. **Construction.**—The construction of an oral contract whose terms are indisputable like that of a written contract, is for the court; but, where the fact as to what were the terms is in dispute and the testimony is conflicting, it should be left to the jury, not to construe the contract, but to find what it in fact was.—American Towing & Lightering Co. v. Baker-Whiteley Coal Co., Md., 75 Atl. 341.

24. **Illegality.**—Where a surviving partner seeking an accounting against the executrix of a deceased partner depends upon an illegal partnership agreement, equity will leave the parties where it finds them.—Vandegrift v. Vandegrift, Pa., 75 Atl. 365.

25. **Performance.**—That the owner of a building made payments thereon and went into possession thereof prior to its completion, held not a waiver of latent defects therein, not in compliance with the contract.—Marchand v. Perrin, N. D., 124 N. W. 1112.

26. **Validity.**—A foreign contract, which would be invalid if made in the country of the forum, is not unenforceable there, because contrary to public policy, unless it be pernicious and injurious to the public welfare.—International Harvester Co. of America v. McAdam, Wis., 124 N. W. 1942.

27. **Copyrights—Expiration.**—On the expiration of the copyright of a novel, any person may make any use of it he sees fit.—Glaser v. St. Elmo Co., Inc., U. S. C. C., S. D. N. Y., 175 Fed. 276.

28. **Sufficiency of Notice.**—Copyright notices published at the bottom of each page of the material attempted to be copyrighted held not sufficient compliance with the copyright act.—Record & Guide Co. v. Bromley, U. S. C. C., E. D. Pa., 175 Fed. 156.

29. **Corporations—Sale of Stock.**—A public statement as to the condition of a corporation held fraudulent as to the buyer of its stock if false, so that a cause of action therefor accrued against the wrongdoer inducing his purchase.—Ligon v. Minton, Ky., 125 S. W. 304.

30. **Costs—Effect of Set-Off or Counter-Claim.**—Where a set-off or counter-claim is filed and allowed, wholly or in part, the party obtaining final judgment is entitled to costs in absence of some special statutory provision changing the general rule of costs to the prevailing party, or, in other words, if plaintiff has judgment ex-

ceeding the set-off or counterclaim, he is entitled to costs, but if the set-off or counterclaim allowed exceeds his demand, defendant is entitled.—Ozias v. Haley, Mo., 125 S. W. 556.

31. **Prevailing Party.**—There can be but one prevailing party in an action at law to recover a money judgment, and though each wins as to some issues, the one who recovers the judgment, and in the end secures the most points is the prevailing party or winner, entitled to costs under Rev. St. 1899, sec. 1547 (Ann. St. 1906, p. 1174).—Ozias v. Haley, Mo., 125 S. W. 556.

32. **Criminal Evidence—Admissibility.**—In a prosecution for assault of a person assisting an officer in attempting to arrest defendant it was error to admit testimony that defendant had been indicted for whipping witness' little brother a crime different from that for which he was being arrested.—Owen v. State, Tex., 125 S. W. 405.

33. **Credibility.**—The credibility of the evidence to prove the circumstances of a confession, as well as the credibility of conflicting evidence, are questions for the trial court, and not reviewable on appeal.—Thomas v. State, Fla., 51 So. 410.

34. **Criminal Law—Jurisdiction.**—The legislature has power to prescribe in what jurisdiction statutory misdemeanors shall be tried, and to make that jurisdiction exclusive.—State v. Sexton, Mo., 125 S. W. 519.

35. **Statute of Limitations.**—If a conspiracy to commit a crime has been carried out and the crime committed, those who committed it are subject to whatever penalties the law imposes, and entitled to whatever protection the law affords; and, if the statute of limitations is a bar to a prosecution for the crime, that bar cannot be lifted by a prosecution for a conspiracy to commit that crime.—United States v. Kissel, U. S. D. C., S. D. N. Y., 173 Fed. 823.

36. **Sufficiency.**—Pleads in abatement, setting up simply irregularities in the selection of jurors, must be certain in every intent, and must leave nothing to be supplied by intendment.—Thomas v. State, Fla., 51 So. 410.

37. **Criminal Trial—Different Offenses in Same Transaction.**—The commonwealth may elect whether it will prosecute under a city ordinance or state law for an offense which is a violation of both; such right being expressly authorized by Const. § 168.—Burdette v. Board of Council of City of Danville, Ky., 125 S. W. 275.

38. **Plea in Abatement.**—A plea in abatement for irregularities in selecting the grand jury held defective in failing to aver that it was filed at the earliest opportunity after knowledge of the indictment.—Pennel v. State, Tenn., 125 S. W. 445.

39. **Crops—Personal Property.**—Growing crops pass by deed, but may be severed by reservation, either by parol agreement or instrument in writing.—Cooper v. Kennedy, Neb., 124 N. W. 1181.

40. **Damages—Breach of Contract.**—Damages for a buyer's breach of an statutory contract of sale, caused by the buyer's bankruptcy, held not recoverable.—In re Inman & Co., U. S. D. C., N. D. Ga., 175 Fed. 312.

41. **Extent of Liability.**—Artist's contract for the construction of a statue held entire, and not severable, so that on breach plaintiff was

entitled to recover, not only nominal damages, but the amount plaintiff had paid in accordance with the provisions of the contract.—*Fidelity Trust Co. v. American Surety Co., U. S. C. C., E. D. Pa.*, 175 Fed. 200.

42.—**Mitigation or Reduction.**—A property owner, who has two contracts protecting him against fire, one with a water company made by the city, and another with an insurance company, is entitled to be made whole in case of a loss; and, when he has collected part from the insurance company, he can only collect the remainder on the contract with the water company.—*Georgetown Water, Gas, Electric & Power Co. v. Neale, Ky.*, 125 S. W. 293.

43.—**Personal Injuries.**—It is the duty of a passenger left at a station to exercise reasonable care to obtain lodgings in the vicinity and avoid unnecessary exposure to danger.—*Illinois Cent. R. Co. v. Poston, Ky.*, 125 S. W. 253.

44.—**Death.**—In an action by an administrator for the negligent death of his intestate, the financial and physical condition of the intestate's surviving mother and younger brother held admissible.—*Birmingham Ry., Light & Power Co. v. Moseley, Ala.*, 51 So. 424.

45. **Dedication—Acceptance.**—Approval by the council of a plat of a proposed addition is in no sense an acceptance of the platted streets as public highways, nor does it cast on the city the duty of keeping such streets in repair.—*Brown v. Scruggs, Mo.*, 125 S. W. 537.

46. **Dower—Transfer.**—A widow's dower in a leasehold for 20 years is a property right, which she can transfer.—*Orchard v. Wright-Dalton-Bell-Anchor Store Co., Mo.*, 125 S. W. 486.

47. **Ejectment—Persons Entitled to Sue.**—The owner of land, whether subject to a public easement or not, may sue for its recovery from one showing no right thereto.—*Betcher v. Chicago, M. & St. P. Ry. Co., Minn.*, 124 N. W. 1096.

48.—**Title to Easement.**—The action of ejectment is inappropriate to try title to an easement.—*Brier v. State Exch. Bank of Macon, Mo.*, 125 S. W. 469.

49. **Eminent Domain—Damages.**—Where, in the prosecution of a public work, no damage is done to property except such as is suffered by the community, no recovery can be had, notwithstanding Const. art. 1, § 17.—*Houston & T. C. R. Co. v. Powell, Tex.*, 125 S. W. 330.

50.—**Expropriation Proceedings.**—In an expropriation suit, the issue of damages must be confined to ascertaining the value of the property, and the damage at the date when the suit was filed.—*Louisiana Ry. & Nav. Co. v. Sarpy, La.*, 51 So. 433.

51.—**Highways.**—Pendency of an appeal from an award of damages for land taken for a town way held not to prevent the town from entering upon the land and constructing the way.—*State v. Fuller, Me.*, 75 Atl. 315.

52. **Estates—Base Fee.**—A base, determinable, or qualified fee with the possibility of reverter is recognized in Maine, and is descendible.—*Pond v. Douglass, Me.*, 75 Atl. 320.

53. **Estoppel—Reliance on Adverse Party.**—Where one person leads another into error, he cannot benefit himself by charging the other with bad faith when he himself is not in good faith.—*Breaux v. Albert Hanson Lumber Co., Limited, La.*, 51 So. 444.

54. **Evidence—Burden of Proof.**—That a certain fact is made by statute *prima facie* evidence does not change the burden of proof, but merely determines the verdict or finding if no other evidence is introduced.—*Inhabitants of Cohasset v. Moors, Mass.*, 90 N. E. 778.

55.—**Contracts.**—Evidence of the prior transactions and negotiations between buyer and seller held admissible to enable the court to determine the intent of the parties in making the contract sued on.—*Putnam-Hooker Co. v. Hewins, Mass.*, 90 N. E. 983.

56.—**Depositions.**—A party is not entitled to take the deposition of a witness in a federal court, under Rev. St. § 863 (U. S. Comp. St. 1901, p. 661), where the witness actually lives at the place of trial and expects to remain there, although his legal domicile may be elsewhere.—*Frost v. Barber, U. S. C. C.*, 173 Fed. 848.

57.—**Indorsement on Note.**—An unrestricted blank indorsement of a note, in general, may not be varied or contradicted by parol.—*First Nat. Bank v. Reinman, Ark.*, 125 S. W. 443.

58.—**Judicial Notice.**—It is common knowledge that in large cities pie and pastry bakeries are quite numerous, and have many persons in their employ.—*State v. Miksicek, Mo.*, 125 S. W. 507.

59.—**Receipts.**—A receipt in full introduced by the party relying on it is not conclusive if obtained by fraud.—*Cache Valley Lumber Co. v. Culver Co., Ark.*, 125 S. W. 430.

60. **Exceptions, Bill of—Alteration.**—Insertion of the initials of plaintiff's next friend in the caption of the bill of exceptions after it was signed held not a material alteration.—*North Alabama Traction Co. v. Thomas, Ala.*, 51 So. 418.

61. **Executors and Administrators—Allowance to Surviving Partner's Widow.**—Allowance may be made to the widow of a surviving partner from the firm assets, as from his own personal estate, though the firm be insolvent.—*Hewitt v. Hayes, Mass.*, 90 N. E. 985.

62.—**Sale of Leasehold.**—Where a probate order directing an administrator's sale of a leasehold was void, it was subject to collateral attack, and the sale thereunder conveyed no title to the purchaser.—*Orchard v. Wright-Dalton-Bell-Anchor Store Co., Mo.*, 125 S. W. 486.

63.—**Title to Real Estate.**—The title to real estate passes primarily on the death of the owner to his heirs or devisees, while the title to personality passes to the administrator.—*Orchard v. Wright-Dalton-Bell-Anchor Store Co., Mo.*, 125 S. W. 486.

64. **Explosion—Negligence.**—Independent of the question of nuisance, one may be liable for explosion for negligence.—*Whaley v. Sloss-Sheffield Steel & Iron Co., Ala.*, 51 So. 419.

65. **Federal Courts—Jurisdiction.**—An action against a railroad company for injuries to a brakeman within a territory of the United States held one arising under a law of the United States within the jurisdiction of the federal courts, to-wit, federal employers' liability act (Act Cong. April 22, 1908, c. 149, § 2, 35 Stat. 65, 66 [U. S. Comp. St. Supp. 1909, p. 1172]).—*Clark v. Southern Pac. Co., U. S. C. C. W. D. Tex.*, 175 Fed. 122.

66. **Fire Insurance—Cancellation of Policy.**—Agent employed to insure plaintiff's property held to have no authority to cancel policies without notice to insured.—*Nabors v. Commercial Union Assur. Co., Limited, of London, England, La.*, 51 So. 429.

67. **Fraud—Damages for Deceit.**—By an ac-

tion in deceit for damages a buyer elects to abide his purchase, and he is not without such remedy because he ratifies the sale.—*Ligon v. Minton*, Ky., 125 S. W. 304.

68.—**Representation as to Value.**—A representation as to value is ordinarily a matter of opinion, and is not deemed fraudulent, but it may be otherwise.—*Crompton v. Beedle*, Vt., 75 Atl. 331.

69. **Fraudulent Conveyances—Mortgage for Future Advancements.**—A mortgage given in good faith for a specific sum as security for future advancements is valid to the extent of the amount specified as against the mortgagor's general creditors.—*Morton v. Jones*, Ky., 125 S. W. 247.

70. **Garnishment—Property Subject.**—If a legatee has the absolute title to personal property, it can be reached by trustee process, but, if he has simply a beneficial interest, it cannot.—*Holcomb v. Palmer*, Me., 75 Atl. 324.

71. **Guaranty—Indorsement.**—The guaranty of an indorsement on a check only applies to the indorser, and does not protect the payee against the risk of cashing a check to which the maker's name is forged.—*National Bank of Rolla v. First Nat. Bank*, Mo., 125 S. W. 513.

72. **Highways—Automobiles.**—Failure of an operator of an automobile to comply with Ky. St. § 2739g, by giving warning of his approach, and using precaution to insure the safety of the occupants of a vehicle ahead of him, held to show *prima facie* negligence.—*National Casket Co. v. Powar*, Ky., 125 S. W. 279.

73.—**Regulation of Vehicles—Ky. St. § 2739g.**—Limiting the speed of automobiles approaching an intersecting road, held enacted for the protection of all persons at or near the intersection on whatever road they may be.—*National Casket Co. v. Powar*, Ky., 125 S. W. 279.

74. **Homestead—Liabilities Enforceable.**—The levy of an attachment does not create a lien on a homestead.—*Strong v. H. T. Elder & Sons*, Tex., 125 S. W. 374.

75. **Indictment and Information—Objection to Grand Jury.**—That for many years no negro had been selected as a grand or petit juror cannot be considered, on a motion to quash an indictment for discrimination as to race in the composition of the grand jury, when the law has been in every respect complied with.—*Pollard v. State*, Tex., 125 S. W. 390.

76.—**Sentence.**—Where defendant was convicted on two counts, one of which was insufficient, a sentence which did not exceed the term properly assessable on a conviction on one count was not erroneous, though the judgment recited that it was imposed for both offenses.—*Ex parte Gouyet*, U. S. D. C., D. Mont., 175 Fed. 230.

77.—**Statutory Offenses.**—Where a statute enumerates the offenses or intent necessary to constitute them disjunctively, the indictment must charge them conjunctively.—*State v. Currier*, Mo., 125 S. W. 461.

78. **Infants—Necessaries.**—Articles suitable and which would be beneficial to an infant are not *ex vi termini* necessities, but the question is for the jury.—*Nielson v. International Text-book Co.*, Me., 75 Atl. 330.

79. **Injunction—Trespass to Real Property.**—One in peaceable possession and occupancy of land may sue to restrain repeated trespasses of one asserting title.—*Baldwin v. Fisher*, Minn., 124 N. W. 1094.

80. **Insane Persons—Deeds.**—The deed of an insane person is voidable only, and not void.—*Dowell v. Dowell's Adm'r*, Ky., 125 S. W. 283.

81. **Interstate Commerce—Foreign Corporations.**—A sale of goods through a traveling salesman of an Iowa corporation to a buyer in Wisconsin held interstate commerce.—*Ady v. Barnett*, Wis., 124 N. W. 1061.

82. **Judgment—Collateral Attack.**—When there is a tribunal created by law to pass on any given state of facts, the findings on conclusions of such tribunal cannot be questioned collaterally.—*Ex parte Koen*, Tex., 125 S. W. 401.

83. **Landlord and Tenant—Holding Over.**—The presumption that a tenant who holds over renews the prior lease on like terms cannot be rebutted by proof of a contrary intention on his part.—*Waterman v. Le Sage*, Wis., 124 N. W. 1041.

84.—**Re-entry by Landlord.**—While trespass *quare clausum frigiti* will not lie by the tenant after entry by the landlord after the expiration of the term, an action will lie for trespass to the person or personal property of the tenant by the landlord in regaining possession.—*Levy v. McClintock*, Mo., 125 S. W. 546.

85. **Larceny—Possession of Stolen Property.**—Where recently stolen property is found in another's possession, he is presumed to be the thief, and in absence of rebutting evidence, if he fails to account for his possession of it in a manner consistent with his innocence, such presumption becomes conclusive.—*State v. Court*, Mo., 125 S. W. 451.

86. **Life Insurance—Insurable Interest.**—Blood relationship in and of itself constitutes an insurable interest.—*Hahn v. Supreme Lodge of the Pathfinder*, Ky., 125 S. W. 259.

87. **Limitation of Actions—Computation of Period.**—If the statute of limitations begins to run so as to sustain a claim of adverse possession, it will not be interrupted on the ground that a subsequent purchaser had no notice of the facts setting it running.—*Eastham v. Gibbs*, Tex., 125 S. W. 372.

88.—**Trusts.**—The defense of limitations is never available against an express trust as between trustees and *cestui que trust*.—*Morton v. Harrison*, Md., 75 Atl. 337.

89. **Livery Stable Keepers—Care Required of Ballor.**—A livery stable keeper need exercise only ordinary care as to a horse intrusted to him for keeping for hire.—*Freeman v. Foreman*, Mo., 125 S. W. 524.

90. **Maritime Liens—Implied Agreement.**—A tacit understanding by both parties that one furnishing repairs to a vessel in a foreign port, although they were ordered by the owner, looked to the vessel for payment, is sufficient to establish an implied agreement for a lien.—*The Venezuela*, U. S. D. C., W. D. N. Y., 173 Fed. 834.

91. **Master and Servant—Authority of Foreman.**—That work plaintiff's decedent was directed to do was outside of the authority of the foreman directing it must be brought to the knowledge of the employee to afford the master the benefit of such limitation.—*Walczenco v. Oxford Paper Co.*, Me., 75 Atl. 328.

92.—**Contributory Negligence.**—A street railway may not make a schedule for the car of a motorman and also make a rule which makes the schedule impossible under usual and ordinary conditions, and then hold the motorman negligent in doing that which is necessary to make the schedule.—*Birmingham Ry., Light & Power Co. v. Moseley*, Ala., 51 So. 424.

93.—**Contributory Negligence.**—An employee, who, in violation of defendant railroad's rules, failed to put a blue flag as a warning on the standing car which he was repairing, held guilty of contributory negligence, precluding a recovery for his death.—*Van Camp v. Wabash R. Co.*, Mo., 125 S. W. 530.

94.—**Injury to Servant.**—Where a superior servant directed decedent to repair an electric light, which could only be safely done while the machinery was at rest, it was the superior servant's duty to see that decedent was safe before starting the machinery.—*Haynie v. Tennessee Coal, Iron & R. Co.*, U. S. C. C. of App., Fifth Circuit, 175 Fed. 55.

95. **Municipal Corporations—Injury to Servant.**—In an action for injury to a switchman, who, in alighting from an engine stepped on a bolt and was thrown, evidence held insufficient to show that any of defendant's employees were negligent.—*Missouri, K. & T. Ry. Co. of Texas v. Jones*, Tex., 125 S. W. 309.

96.—**Streets.**—An individual property owner can maintain a suit to abate an obstruction to a street constituting a public nuisance only by showing some special and substantial injury

to his own property rights.—*Ingram v. Turner*, Tex., 125 S. W. 327.

97.—**Streets.**—Where land is condemned by a city for street purposes, it is converted into a public street, although not open to the public for use as a street.—*Brown v. Scruggs*, Mo., 125 S. W. 537.

98.—**Use of Street.**—Private rights not being interfered with by resolution of a city council permitting a society to locate drinking fountains in the streets, held, abutting owners are not entitled to be heard on the resolution before its passage.—*Levy v. City of Elizabeth*, N. J., 75 Atl. 312.

99. **Negligence—Dangerous Premises.**—Under New York City Building Code, § 95, expressly ratified by the legislature, an owner of a building failing to close the elevator guards and trapdoors at night held liable for the death of a policeman falling down the elevator shaft.—*Racine v. Morris*, 121 N. Y. Supp. 146.

100.—**Elevators.**—An elevator owner held not liable for injuries to a child caused by the negligence of the operator on the theory that the elevator was attractive to children.—*Sweeney v. Atkinson Improvement Co.*, Ark., 125 S. W. 439.

101. **Partnership—Compensation.**—In the absence of a special agreement, a partner is not entitled to compensation for his services for the firm in addition to his share of the profits.—*Ruggles v. Buckley*, U. S. C. C. of App., Sixth Circuit, 175 Fed. 57.

102.—**Rights of Surviving Partner.**—The right of a surviving partner to the firm property extends to all partnership real estate, in whosoever name the legal title may have been, so far as may be necessary to wind up its affairs.—*Hewitt v. Hayes*, Mass., 90 N. E. 985.

103. **Pleading—Account Stated.**—In an action on an account stated, held that the bill of particulars need not contain the items of the account.—*Lyell v. Walbach*, Md., 75 Atl. 389.

104.—**Sufficiency of Complaint.**—In pleading matters which are in the nature more within the knowledge of defendant than plaintiff, less particularity is required in the complaint than in other cases.—*Birmingham Ry., Light & Power Co. v. Moseley*, Ala., 51 So. 424.

105. **Principal and Surety—Consideration.**—Where both plaintiff and defendant were bound as sureties on a note, a promise by defendant to pay the amount of the judgment rendered on the note was without consideration, where plaintiff undertook nothing additional and parted with nothing when he entered into the agreement.—*Barton v. Haltom*, Ark., 125 S. W. 418.

106. **Principal and Agent—Liability to Principal.**—An agent receiving money from third persons for his principal cannot refuse to pay it over because the money accrued from an illegal transaction between the principal and such third persons.—*Monongahela Nat. Bank v. First Nat. Bank*, Pa., 75 Atl. 359.

107. **Principal and Surety—Set-Off.**—An owner of property which occupies the position of surety of the principal debtor held entitled to relieve the property of the burden by the equitable application of set-offs.—*St. Croix Timber Co. v. Joseph*, Wis., 124 N. W. 1049.

108. **Railroads—Killing Animals.**—Defendant railroad company held not liable for killing plaintiff's horses, that escaped through a crossing gate left open by trespassers.—*Weaver v. Chicago & N. W. R. Co.*, Iowa, 124 N. W. 1088.

109. **Removal of Causes—Jurisdiction.**—Where a suit could not properly be brought in a federal court of the district because of the nonresidence of the parties, it could not generally be removed to that court.—*Clark v. Southern Pac. Co.*, U. S. C. C. W. D. Tex., 175 Fed. 122.

110. **Reversions—Injury to Reversionary Interest.**—Under the common law an action of trespass on the case was the appropriate remedy for reversioners for injuries to their reversionary interest by reason of permanent injury to the freehold.—*Crowder v. Fordyce Lumber Co.*, Ark., 125 S. W. 417.

111. **Sales—Rescission.**—A buyer held not required to rescind the contract of sale as a condition to his recovery of an excess payment made thereon.—*Scheer v. Clinton Falls Nursery Co.*, N. D., 124 N. W. 1115.

112.—**Warranty of Title.**—Willingness on the part of the vendor to allow a deduction of the amount of an incumbrance from the purchase price by the vendee will not satisfy a covenant to convey free of incumbrances.—*Pfister v. Heins*, 121 N. Y. Supp. 173.

113.—**Written Contract.**—An order for goods, omitting the name of the seller with the buyer's acceptance of goods shipped thereunder, held to constitute a written contract of sale.—*Ady v. Barnett*, Wis., 124 N. W. 1061.

114. **Sheriffs and Constables—Liability on Bond.**—Where a marshal in making an arrest unnecessarily shot a bystander whom he suspected of an intent to interfere with the arrest, the officer and the sureties on his bond were liable to the infant children of deceased.—*Martin v. Smith*, Ky., 125 S. W. 249.

115. **Shipping—Damage to Cargo.**—Damage to a cargo of wheat from water leaking from a broken feed pipe held not due to the unseaworthiness of the vessel at the beginning of the voyage, but to perils of the sea, for which she was not liable under the bill of lading.—*The Rappahannock*, U. S. D. C., W. D. N. Y., 173 Fed. 829.

116. **Street Railroads—Frightening Horses.**—A street car motorman held bound, not only to stop sounding the gong, but to stop the car, if practicable, to allay the fright of a horse being driven ahead of the car, on the motorman's discovering his restive condition.—*North Alabama Traction Co. v. Thomas*, Ala., 51 So. 418.

117.—**Injuries to Persons on Track.**—Though deceased after alighting from defendant's street car negligently started to cross the adjoining track, defendant was liable if its motorman on seeing deceased had time to stop his car on such walk; and failed to do so.—*Williams v. Metropolitan St. Ry. Co.*, Mo., 125 S. W. 522.

118.—**Look and Listen.**—Failure to look before driving upon the tracks of a street railway is negligence per se.—*Sontum v. Mahoning & S. Ry. & Light Co.*, Pa., 75 Atl. 189.

119. **Subscriptions—Promoters.**—Promoters of a subscription held bound to exercise good faith and to deal openly and fairly with each prospective subscriber.—*Sigler v. R. W. Winstead & Co.*, Ky., 125 S. W. 272.

120. **Telegraphs and Telephones—Proximate Cause of Injury.**—A telephone company, maintaining poles and brace wires in a parkway of a public street, in such a manner that they are dangerous to persons crossing the parkway, is liable for injuries proximately resulting therefrom.—*Bentley v. Missouri & Kansas Telephone Co.*, Mo., 125 S. W. 533.

121. **Tenancy in Common—Duty of Tenant in Possession.**—A tenant in common receiving the rents and profits is bound to make ordinary, needful repairs.—*Clute v. Clute*, N. Y., 90 N. E. 988.

122. **Treasors—Common Law.**—Under the common law and the Civil Code of Practice in actions to recover for injuries to the possession of land, the complaint must show that plaintiff is in possession.—*Crowder v. Fordyce Lumber Co.*, Ark., 125 S. W. 417.

123. **Vendor and Purchaser—Confidential Relations.**—A party to a sale may, without direct misrepresentation, be guilty of fraud by means of words or acts calculated and intended to deceive, though there is no confidential relation.—*Crompton v. Beedle*, Vt., 75 Atl. 221.

124. **Waters and Water Courses—Riparian Rights.**—A riparian proprietor has, as a rule, the right to demand that the stream shall flow through his land in its usual quantity.—*Fischer v. Trustees of Village of Clifton Springs*, 121 N. Y. Supp. 163.

125. **Wills—Construction.**—A will bequeathing testator's real estate to his wife and children held not to pass a leasehold for 20 years.—*Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, Mo., 125 S. W. 486.

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PUBLIC POLICY GIVING TO PRIVATE USE THE RIGHT OF EMINENT DOMAIN.

By the decisions in *Clark v. Nash*, 198 U. S. 361, and *Strickley v. Highland Boy Mining Co.*, 200 id. 527, conception of what might come under the designation of a public use, so as to authorize the taking of property by proceedings for condemnation, has been very greatly broadened. Were this not so, we would fail to understand how the legislature of Massachusetts ever would have thought of submitting to the Justices of the Supreme Judicial Court of Massachusetts inquiry as to the constitutionality of such an eminent domain statute as was proposed to be enacted in the event of an affirmative reply. In re Opinion of the Justices, 91 N. E. 405.

The justices answered negatively, however, and it appears to us that there is something of a contrast between what they say and the views expressed by Justices Peckham and Holmes in the Clark and Strickley cases. Other readers might not think there is any necessary conflict between these cases, but to us the opinions breathe a very different spirit—the state court holding firmly to old traditions, and the federal court trying to accommodate them to new conditions.

The Massachusetts inquiry recited, that the commercial interests and general prosperity of the inhabitants of the commonwealth, and particularly of the city of Boston, were dependent on that city having facilities for the transaction of foreign and domestic trade the same as other cities, and the narrow and tortuous streets in that part of Boston attempted to be used were insufficient, unless the city should both be allowed to condemn land in straightening and broadening those streets and acquiring abutting and intervening broken parcels of lots for warehouses and other structures

to be held in private ownership with restrictions to business uses promotive of trade and commerce.

The court, after conceding the city's right to condemn for street purposes, said: "The only question about which there is a possibility of doubt is whether the proposed use of the land outside of the thoroughfare is a public use. It is plain that a use of property to obtain the possible income or profit that might inure to the city from the ownership and control of it would not be a public use." Further on the court stresses strongly, by repetition and otherwise, that the benefit to the public must be direct and not incidental. "However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental."

But do the Strickley and Clark cases proceed upon any such theory? The Utah constitution declared that among the public purposes authorizing the taking of private property by condemnation were "roads, railroads, tramways, tunnels, ditches, flumes, pipes and dumping places to facilitate the milling, smelting or other reduction of ores or the working of mines."

The Strickley case relied on the Clark case in affirmance of the state supreme court allowing condemnation of a right of way across another's land by a corporation for structures for an aerial bucket line in the working of its mines. Mr. Justice Holmes said the Clark "case established the constitutionality of the Utah statute so far as it permitted the condemnation of land for irrigation of other land belonging to a private person, in pursuance of the declared policy of the state."

That seems a tremendous stretch to go, and the justice shows what was deemed its justification by stating the theory upon which the Clark case proceeded as follows: "While emphasizing the great caution necessary to be shown, it proved that there might be exceptional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which under other

circumstances would be left wholly to voluntary consent. In such unusual cases there is nothing in the Fourteenth Amendment, which prevents a state from requiring such concessions. In the opinion of the legislature and the Supreme Court of Utah, the public welfare of that state demands that aerial lines between the mines upon its mountain sides and the railways in its valleys below should not be made impossible by the refusal of a private owner to sell the right across his land. The constitution of the United States does not require us to say that they are wrong."

These words either mean that a private use, working incidentally only to a public benefit, may claim the right of eminent domain or they are so very ambiguous as to reflect little credit upon the writer of this opinion. If they do mean this, they seem very squarely opposed to what is said by the Massachusetts Justices in their reply to the Massachusetts legislature.

Justice Peckham, speaking in the Clark case, said: "The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use even by an individual, where, in the absence of such facts the use would be clearly private."

The only use in the case before the court was that of a way for a ditch to be used in the irrigation of a particular tract of land, the crop and profits from which were to be the exclusive property of the owner of the land. The policy of the state was that all irrigable lands should be irrigated.

The common thought is that the exercise of the right of eminent domain is largely the basis of our right to call carriers and some other avocations public utilities, which come under the yoke of legislative regulation.

But in the Utah statute and others of its kind in arid and mining states the exercise of the right of eminent domain has its supposed justification in what subserves, either directly or indirectly, a public policy.

Justice Holmes speaks of conditions in laying the foundations of public welfare as justifying the compelling of "concessions

(of property rights) from individuals to each other." In Massachusetts it might very plausibly have been argued that *preserving* the foundations of prosperity affords similar justification.

It does not seem a very far cry from what was declared constitutional in the federal cases to what the Massachusetts legislature was seeking to obtain. The federal cases tend to bring confusion in the application of an ancient and well-established rule, and the Massachusetts opinion helps to hold us to old moorings, and the unassailable right of private ownership.

NOTES OF IMPORTANT DECISIONS

EMINENT DOMAIN—UNITING ESTATES SO AS TO INCREASE DAMAGES.—The case of *Boston Chamber of Commerce v. City of Boston*, 30 Sup. Ct. 459, proves very conclusively that the way one restricts his estate in favor of another may operate very decidedly to the advantage of the public in respect to the amount of damages that may be claimed in condemnation proceedings.

It appears that the Boston Chamber of Commerce owned a triangular parcel of land, upon the base of which was a building. The apex of the triangle was taken by the city of Boston for a street. The Central Wharf and Wet Dock Company had an easement of way, light and air over the condemned land. By the taking the city superposed a public, upon this private, easement. It was sought by the Chamber of Commerce and the Dock Company to unite their estates and claim for damages for property taken as of an unrestricted estate. Upon the city objecting it was stipulated that, if this uniting of estates could be claimed, the damages should be assessed at \$60,000, and if not only \$5,000. From a decision by the Massachusetts Supreme Judicial Court, holding in favor of the city's contention, appeal was taken to the federal Supreme Court. See same case, 195 Mass. 338, 81 N. E. 244.

The federal question raised was, that there was a violation of the Fourteenth amendment in denying the right of the owners of the dominant and servient estates to pool their interests. As to this, Mr. Justice Holmes says:

"The petitioners contended that they had a right, as matter of law, under the constitution, after the taking was complete and all rights were fixed, to obtain the connivance or concurrence

of the dominant owner, and by means of that to enlarge a recovery that otherwise would be limited to a relatively small sum. It might be perfectly clear that the dominant owner never would have released short of a purchase of the dominant estate—in other words, that the servitude must have been maintained in the interest of lands not before the court—but still, according to the contention, by a simple joinder of properties after the taking, the city could be made to pay for a loss of theoretical creation, suffered by no one in fact.

"The statement of the contention seems to us to be enough. It is true that the mere mode of occupation does not necessarily limit the right of an owner's recovery.

* * * * *

"But the constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not tracts of land. And the question is: What has the owner lost? not: What has the taker ga'ned? We regard it as entirely plain that the petitioners were not entitled, as matter of law, to have the damages estimated as if the land was the sole property of one owner."

The city's contention was, that, as the restriction in favor of the Dock Company was very valuable, the damage to the market value of the estate to the Chamber of Commerce was little or nothing, and the Dock Company lost nothing at all "by the superposition of a public easement upon its own." Suppose, however, the Dock Company had obligated itself to pay an annual sum for that easement, with forfeiture in case of non-payment, would not the owner of the fee be deprived of his ability to enforce forfeiture? Or could it claim this annual sum at all, if the easement formerly given by this owner is being derived, not from the owner, but through the city? If it is so that nothing substantial was being taken from either of the petitioners, this seems more fortuitous than otherwise. Another such case, wholly on all fours, might never arise.

CRIMINAL LAW—WEARING BADGE AS EMBLEM OF SECRET SOCIETY BY A NON-MEMBER.—In the case of Hammer v. State, 89 N. E. 850, our attention is called to affirmation of a conviction of one charged with unlawfully wearing the badge and emblem adopted by an incorporated society of Indiana, the defendant not being at the time a member thereof. The theory of the statute is that this is a police regulation directed against false per-

sonation and false pretenses. The court says: "The statute does no more than make a misdemeanor of that which at common law was indictable as a 'cheat' independently of our statute as to false pretenses and false personation." This is an assumption which we are indisposed to speak upon, but we rather think a conviction independently of such a statute would be difficult to make stand.

Taking the view, then, that the statute creates a new offense, we think the Indiana court is certainly correct in holding it has no relation whatever to creed, religion or mode of worship. We also are in agreement with the court that for a non-member to wear a badge or emblem of an order or society "is and of itself a deceit and false pretense, and its object could be nothing else than deception, which it is in and of itself, with possibly ulterior motives," and "it is evidence of the first act of an imposter in the course of a premeditated design to prey upon those who from fraternal, charitable or sympathetic motives become the victims of false personation, imposition and fraud, whether members of the society or not."

But what seems strange to us is that a statute of this kind makes a classification between secret and non-secret societies, when the only basis that can sustain it is fraternity. It seems to us that secrecy is an arbitrary classification, and carries an assumption of justification which may not exist in fact. Indeed, secrecy is nothing that the public has any interest in at all, while fraternity in the accomplishment of a common worthy purpose is of concern to the state, and has a right to its protection.

And, also, that a society should be incorporated appears to us another arbitrary classification. The law recognizes benevolent and religious associations, incorporated and unincorporated, and we see no reason why the latter should be left out of protection, or why the public may not be as much harmed by imposters as to them as to those which are incorporated.

The classification adopted by the statute seems to us an unconstitutional one, and, therefore, it should be declared invalid.

In State v. Holland, 37 Mont. 393, 96 Pac. 719, there was a conviction under a statute forbidding wearing by a non-member of a badge of Grand Army of the Republic, etc., of the Elks, K. P., labor organizations, "or any society, order or organization of ten years' good standing in the state of Montana," with a proviso in favor of wives, daughters, sisters or mothers of members in good standing." The general words of the statute were limited by the principle of *id omne genus*, and its general constitutionality upheld on the right of the

state to prevent the principle of fraternity and charity being exploited by imposters on members and the general public, but further attack upon its constitutionality was sustained upon the ground, that there was a vesting of legislative power in such societies, as no citizen could tell from the text when he is subject to its penalties, and badges being changed, what would be an offense or an innocent act to-day would be changed to-morrow. Then, also, the proviso was held to create a classification obnoxious to the Fourteenth Amendment, in its guarantee of "equal protection of the laws."

The former objection, applicable to the Indiana statute, appears quite tenable, and it and the arbitrary classification which we spoke of, *supra*, make, in our opinion, the Indiana statute unconstitutional.

"THEORY OF THE CASE." WRECKER OF LAW.*—III.

Perhaps one of the most serious troubles with the law to-day, as has been pointed out in a previous article of this series, is the failure to understand the fundamental difference between the common law, or mandatory record, or "record proper," and the bill of exceptions or "statutory record." The difference involved goes to the root of the law, and yet owing to fancied distinctions between "substantive" and "adjective" law, the former being treated as all important, and the latter as merely subsidiary, our students are being impressed with the idea that the study of adjective law deserves but a small portion of their time in the school, and that its principles can be picked up in practice, without instruction.

The result is that men trained thus get into the profession and on the bench imbued with the idea that adjective law being technical (which it is), there must be found some way of eliminating the "technicality." They desire, laudably enough, to "get at the merits," but being untrained to see that the "merits" can be known to the court only through the pleadings and other parts of the record prescribed by law, they be-

come impatient of the restraint imposed, depart from the state's record, allow the parties to raise new and unpleaded issues, and in doing so actually believe they are expediting the cause on its "merits."

And when the practitioner objects to having his client's rights trampled upon in this manner, he incurs the animadversion of the trial court, often in the presence of the jury.

Multitudo imperitorum perdit curiam.

Now, the position taken in this series of articles is that "form" is just as necessary in the law, if its symmetry is to be preserved, and justice is to remain certain, as it is in engineering, chemistry or medicine, or as it is in baseball, or tennis, for that matter. If you want to make an effective stroke in golf, or an effective punch in the prize ring, you must do it according to form. All of which simply means that there are principles underlying all human effort, which, if observed, make the effort effective; if not observed, make it abortive or inefficient.

So in the law,—its effort is to keep the peace of the state, to settle, to finish litigation. *Interest reipublicae ut sit finis litium.* But this does not mean indiscriminate haste. It means that a cause must be settled according to prescribed rules, to the end that when it is once decided, it will be in fact "settled." The cause must not be left, after judgment, in the chaotic condition of having pleadings setting forth one cause of action, evidence developing another, and perhaps a judgment based upon both, or neither. This is not speculation. Specific instances can be given where exactly these things have happened.

The technics of the law must be observed, or the law will be destroyed. We are drifting that way at present. Why do not the members of the bar who believe so, and who are saying so, on all sides, make their protest effective?

It can be shown that a knowledge of the principles of the very subject which has been so long neglected—practice and procedure—would go far to remedy the disease, and to restore the harmony of the law.

*For two former Articles see 70 Cent. Law Jour., 294-296; 311-314.

If the bar as a whole appreciated the maxims that define and declare the position of the government in procedure; if every lawyer knew what it is that the state demands shall be shown by the record to constitute a *coram judice* proceeding; if he knew in other words what the parties may waive or stipulate away, and what waiver the state forbids, we would do away at one stroke with waiving pleadings, and the whole "theory of the case" doctrine. Then when we secured a judgment, it would be one based on the pleadings, which we are told are the foundation of the action; it would be a judgment that would stand on collateral attack; it would truly and in fact, put an end to the litigation, instead of as now, giving birth to more.

Of course, the matter may be looked at from many viewpoints. One is that the profession, to observe the forms of the law, must, somehow, be taught to understand the principles at the bottom of that endless discussion, so mystifying to lawyers, about the differences between the bill of exceptions on the one hand and the record on the other.

The true reason that forces our courts to ignore, for instance, matter in a bill of exceptions, which ought to appear in the record proper or common law or mandatory record, is that the latter record is the state's record, while the former record is the party's record. That is the difference in a nut-shell. It can be argued over pages. The state, for the benefit of the public at large, requires the record in every case to show certain facts. If these facts are shown, we have a *coram judice* proceeding, and the judgment is good on collateral attack. There need be no bill of exceptions at all—in most cases there is none. If these facts do not appear—if there are fatal defects on the face of the state's record, then the proceeding is *coram non judice*. The parties and the court cannot waive these requirements, because the state is a party in interest and does not consent. The state requires a record from which third parties can tell without opening the bill of

exceptions (there may be none) what was decided.

Now suppose the petition states one cause of action, but at the trial the parties want to go into another, and the court lets them. Then judgment is entered on the new cause developed at the trial. There is no appeal and no bill of exceptions. Then we have the spectacle of pleadings setting up one cause of action, and a judgment on another. Is it good on collateral attack? No, decidedly not; the judgment is void. The whole thing has to be thrashed over again and new and conflicting rights determined. So it is apparent that the state's record cannot be waived. It must be observed, or chaos results. If the parties cannot depart from the state's record, in their bill of exceptions, neither can they bolster up the state's record by allegations in their record. The state's record speaks for itself and what ought to appear there must appear there and nowhere else.

The Supreme Court of Missouri has reiterated over and over again its position that the parties' record cannot be opened to help out the state's record. Milling Co., 222 Mo. 306. Judge Lamm, in Pennowfsky v. Coerver, 205 Mo. 135, makes an eloquent appeal to the profession, to learn this lesson, and concludes, almost plaintively, "So mote it be." The supreme court is unquestionably correct in its position, and would not be so often misunderstood had our lawyers been trained to see the state in procedure. See also Planing Mill Co. v. Chicago, Lead. Case, 2d, 3 Gr. & Rud.

The state's position can be seen from a consideration of the following two maxims of procedure:

1. *De non apparentibus et non existentibus eadem est ratio.*
2. *Omnia praesumuntur rite et sollemiter esse acta.*

There is a philosophy underlying the mandatory record, or record proper, and a philosophy underlying the statutory record, or bill of exceptions. We refer to the rules concerning error appearing in these two records, and the time and manner of at-

tacking it. Error, in matters of substance, appearing on the face of the mandatory record, may be taken advantage of by the general demurrer, and its correlatives, the motion in arrest, motion for judgment *non obstante veredicto*, the order of repleader, objections upon collateral attack, and when questions of *res adjudicata* are raised, by insisting that the necessary facts for the *coram judice* proceeding do not appear. All these objections to substantial defects in the mandatory record, while made at different stages of the proceeding, are directed against error of the same nature, appearing in the same record; for instance, that the complaint does not state facts constituting a cause of action. The different stages, therefore, at which these fundamental record defects may be raised, may be looked upon as a continuous chain or series of vertebrae, making up a harmonious articulated system of procedure, deriving its vital force from the maxim *De non apparentibus* and its cognate maxims. In other words, matters of substance, which fail to appear in the mandatory, or record proper—the state's record—are and must be treated in a constitutional government, as though they do not exist. The consequence is that such defects may be taken advantage of at any stage of the proceeding. At one stage the objection is called a motion or general demurrer, at another, motion in arrest, or *non obstante veredicto*, or repleader; or, after the direct proceeding is over, the objection may be raised by collateral attack on the fatally defective judgment, or may be urged in questions concerning its effect as *res adjudicata*. At whatever stage these objections to the record are raised, they are the same in essence—they amount in all cases to showing the court that the whole proceeding is affected with a fatal weakness through failure of the record to show those jurisdictional facts which the state requires it must show to constitute the *coram judice* proceeding. Underlying all these various modes of attacking a proceeding which is fatally defective, is the principle expressed in the maxim, *De non apparentibus, et de*

non existentibus, eadem est ratio: what is not made to appear is to be treated as though it does not exist. This maxim is the great maxim of procedure—a maxim, unfortunately, which is not taught to our students, and not always enforced from the bench. It is, as W. T. Hughes expresses it, a "constitutional implication"—that is to say, a constitutional government must necessarily respect it. Legislatures may pass laws "abolishing" pleadings, but the courts govern and protect and must rule. Legislatures may pass statutes of jeofails, providing that when a verdict shall have been rendered, the judgment shall not be affected or impaired "for the want of any allegation or averment on account of which omission a demurrer could have been maintained." But the courts invariably annul such enactments, in so far as they attempt to cure errors of substance, that is, all errors reviewable upon *general* demurrer, or what amounts to the same thing, upon motion in arrest, and the other methods above pointed out, of calling the court's attention to the fact that there is nothing before it upon which to act. The courts, it is true, seldom by name quote the maxim *De non apparentibus*. There is a perceptible effort to ignore maxims, and to discover and set up "new" fundamental principles of law. But the human mind has perceptions of justice which will not be denied. It works, under its own laws, in obedience to these perceptions, and asserts them in the most unexpected ways. Even the judge who is most deferential to "our statute" (providing it violates no type on paper provision of a written constitution) will here and there turn upon it and denounce it as unjust, and void, without reference to any authority other than his own judicial perceptions of morality, convenience, necessity, reason—in short, of justice.

It is thus the maxim, *De non apparentibus*, operates, silently, but resistlessly, hidden, perhaps beneath pages of citations that would be unnecessary were our students trained to pronounce the magic name of the maxim.

"What does not judicially appear, is pre-

sumed not to exist." It is so simple, as to need no citation. For instance, the law presumes ownership from possession. Possession, like convenience, necessity and reason, is one of the big facts in the law. It is a basic, pivotal position. Therefore if A is in possession of property, B cannot recover it from him without stating (*De non apparentibus*) and proving (*Frusta probatur*) a cause of action. To let B take the property without stating, and then proving, a cause of action, would be to deprive A of his property without "due process of law." This is just as true in England, where they have no written constitution as it is here, where we have. The written constitution does not change the situation on this side of the Atlantic, in the slightest degree. It is an inherent perception of the justice of the thing that leads the white races to require a plaintiff to set out his cause of action where all may see it and know what it is. The difference is not one between a written constitution and an unwritten or prescriptive one. It is the difference between a constitutional government (written or unwritten) on the one hand, and a despotism, on the other. The Sultan of Turkey can take a man's property and life without the useless forms of procedure. They are too technical for him. The English and American governments have to observe these inconvenient "technicalities"—that is the difference between the two kinds of government—a difference fundamental enough. It is to be observed, too, that some of our leaders of the bar are doing their best to eliminate pleadings, and substitute the Turkish method of transferring property. Some of our tribunals have succeeded in getting away from the "technicalities" of pleadings, and have substituted the method of pleading for recovery of a horse, and allowing the pleader to recover on his "theory of the case" that what he really wants is not a horse, but a cow. The position of these courts seems to be that this is a speedy method of justice, and puts an end to litigation by letting the parties "fight it out on the *merits*" without bothering with form. But when some other court has the problem put up to

it, on collateral attack, whether such a judgment for a cow instead of a horse is *coram non judice*, and void, then it begins to look doubtful whether the litigation is ended, or whether it is just beginning. "Consider the landmarks which thy fathers have set." It is a fairly safe proposition that the Roman knew how to govern, and therefore, how to keep the peace, and therefore how to end litigation. He had plenty of experience, and he has handed down to us no maxim that the writer has heard of, telling us that pleadings can safely be waived. It is also safe to say that minds like Bacon's, Mansfield's, Ellenborough's, Kent's, Marshall's and Story's understood the necessity of a record which would stand the tests of *res adjudicata* and of collateral attack. Neither do they countenance waiving the pleadings.

The conclusion would seem to be irresistible therefore that if A must state a cause of action before he will be allowed to take property away from B, no legislative or judicial short-cut can eliminate pleadings, or allow them to be waived. The answer sometimes is, yes, the thing cannot be done, but we are doing it. And, unfortunately, the answer is only too true. As Judge Dillon says, "Conditions are appalling," etc., etc.

But is this any excuse—any reason for not stopping our headlong course to destruction? Are we persistently and forever to refuse to teach our students the technics of our profession—its very groundwork—and continue to turn them loose from our schools, helpless as infants, with a disjointed knowledge of "substantive" law? Shall we continue to dismember an indivisible subject into "adjective" and "substantive" law; and then "teach" its "substantive" half? Is it not plain that our text books on "substantive" law—say contracts—are necessarily largely made up of "adjective" law, in which way for the most part the poor student has to get his "adjective" equipment? And what an equipment! There is scarcely a student out of our great colleges that understands the basic principles of procedure that, in the very nature,

and out of the heart of, things, create, control and mould the "substantive" law.

For instance, how many students are there who can stand an examination on the different functions,—different fields of operation—of the principle we have above discussed, *De non apparentibus* (what does not appear is presumed not to exist), on the one hand, and, on the other hand, of the maxim, *Omnia praesumuntur rite et soleniter esse acta* (all things are presumed to be regularly and rightly done)? It will be admitted that but few could stand the test, and yet an understanding of these two principles—a knowledge of when one operates, and when the other, is necessary—to take an illustration—to enable a lawyer to decide whether or not a proceeding is *coram judice* or *coram non judice*. To attempt to apply one principle where only the other can operate, might mean the loss of a great case and thousands of dollars—might mean the ruin of a promising career. Of course, the student cannot be blamed. It is simply that he is not taught fundamental principles. Nobody now living is to blame. Years ago, the profession got off the track, and our law teachers nowadays do not seem to know how it was brought about, or how to get back. At least, so far as has come to the writer's knowledge, the only book that grapples with these problems is W. T. Hughes' *Grounds and Rudiments of Law*.¹ This question is so important that it will be reserved for a subsequent article, in which *Stephen on Pleading* will be reviewed.

The fields of operation of these two principles are entirely distinct—they adjoin each other, but do not overlap. The maxim *De non apparentibus* applies to matters of substance which the state requires shall be affirmatively shown on the face of the record, or in the case of courts of superior jurisdiction, in the files. If one of these necessary matters is entirely absent, the judgment is *coram non judice*. It is a nullity. There is no time saved in allowing

the parties litigant to reach a judgment, built upon such a record.²

Where, however, a jurisdictional fact, as for instance, valid service, the statement of a cause of action, jurisdiction of the subject matter, etc., is stated, but only in an inferential or indirect manner, so that the proceedings are formally defective, and open to objection, say, by special demurrer, motions to make more definite, or to strike out, etc., then there having been no such timely objection made, and there being some evidence in the trial court's record, of the existence of the disputed fact, the appellate court will apply the maxim, *Omnia praesumuntur rite*, and will uphold the judgment.

Thus, *De non apparentibus*, and its cognate maxims, are principles of strict construction, requiring the courts of a constitutional government to properly obtain jurisdiction of a valid cause of action, before they can take property from one man and give it to another.

Omnia praesumuntur, on the other hand, and its cognate maxims, like *consensus tollit errorem* (acquiescence in error obviates its effect); *ut res magis valeat quam percat* (we should conserve rather than destroy) apply only to cases where all fundamental facts appear, so that there is something to build on, but where they do not appear in formal manner, or in proper place.

Many cases can be cited that have brought confusion into the law by failing to observe this distinction. An instance is *Cooper v. Reynolds*, 10 Wall. 308; 19 L. Ed. 931, by Justice Miller, Field, J., dissenting, where *omnia praesumuntur* was wrongly applied.

See the well considered case of Camp-

(1) See titles "De non apparentibus," Gr. & R. 926, and cases.

(2) *Debole fundamentum*, 2 Gr. & R. 471, and cases there cited.

bell v. Porter, 162 U. S. 478, Lead. Case 2, 3 Gr. & R. (Datum Posts), where the true *de non apparentibus* rule is laid down that objection may be raised at any stage of the proceeding that the court is without jurisdiction.

The limits of liberal construction, on the principle of *omnia prae sumuntur* will be found laid down by Lord Ellenborough in Jackson v. Pesked, 1 Maule & Sel. 234, quoted Steph. Pl. 149; also by Story, J., in Dobson v. Campbell, L. C. 232a, 3 Gr. & Rud.

This limitation is well set out in Holland v. Daniel, 4 J. J. Marshall (Ky.) 20, approved and followed in Ropes v. Clay, 18 Mo. 383; 59 Am. Dec. 314n:

"It is a general rule of pleading established by the common law because it is a dictate of common sense, that after verdict it will be intended that everything was proved without proving which there could not have been a verdict for the party: Provided the declaration contains a general allegation of a cause of action, defective only in some circumstance of act which may be embraced by it, and inferred from it."

Those words "inferred from it" mark the line between *de non apparentibus* and *omnia prae sumuntur*. Where the necessary facts cannot be inferred, *omnia prae sumuntur* has no application. The judgment is fatally defective. *De non apparentibus et de non existentibus, cadem est ratio* is the ruling principle. U. S. v. Cruikshank, L. C. 232, 3 Gr. and Rud.; Rushton v. Aspinall, Smith's Lead. Case. 8th Ed., Lead. Case 5, 3 Gr. & Rud. *et seq.*

EDWARD D'ARCY.

St. Louis.

(Note.—In my former letter, the case of Cape Girardeau v. R. R., 222 Mo. 461, 486-487, was omitted by the printer at the end of p. 313.—E. D.)

BIGAMY—EVIDENCE.

OLIVER v. STATE.

Court of Appeals of Georgia, April 19, 1910.

There is no error in charging the jury in a prosecution for bigamy that the fact of the first marriage might be established by sayings or declarations of the defendant proved to have been made by him during the time when he and the alleged first wife were living together as if they were husband and wife.

POWELL, J.: 1, 2. The indictment charged "A. D. Oliver, alias Le Roy C. Harding, alias Charles Blazer, alias John R. Davis, with the offense of bigamy, for that the said defendant on the 31st day of March in the year 1909, in the county aforesaid, did then and there, unlawfully and with force and arms, being lawfully married to one Mary Ella Hodges, did marry one Rosebud English, the said lawful wife, Mary Ella, being then and there alive, which fact was then and there known to and by said defendant." The defendant demurred on the ground that the indictment failed to set forth the time and place, when and where the defendant was married to Mary Ella Hodges; also because it failed to allege that he had not been divorced from Mary Ella Hodges at the time of the alleged second marriage. The first headnote is taken verbatim from the case of Murphy v. State, 122 Ga. 149, 50 S. E. 48. The ruling in the second headnote seems equally obvious. The indictment is substantially in the language of the statute. The grant of a divorce would be a matter of defense not necessary to be negatived in the indictment; if, indeed, the allegation that he was then and there lawfully married to the alleged first wife is not equivalent to an allegation that the marriage had not been dissolved by a divorce decree.

3. Defendant moved to continue because of the absence of one, White, whom he desired to use as a witness. It appeared that he wished to prove that White, as United States marshal, had measured him and had otherwise physically examined him, and that White's measurements did not correspond with certain Bertillon measurements which had been sent out from some source, probably the United States prison in Ohio, describing one Le Roy C. Harding, which the state contended was one of the aliases of the defendant. As the state was not relying on any Bertillon measurements to identify the prisoner, White's alleged testimony, when boiled down, would have been simply and

solely to the effect that the present prisoner did not correspond with what some outsider had said should be the correct description of him. It was not insisted that White had any knowledge of the correctness of the alleged Bertillon measurements, and, as his testimony would not have been admissible on the trial, there was no error in refusing a continuance for the purpose of getting it.

4. The state tendered in evidence a certified copy of a divorce proceeding brought in the Fulton superior court by Mary Ella Harding against Le Roy C. Harding, filed in office July 1, 1908, on which, on July 5, 1908, the defendant therein acknowledged service, and on which on September 26, 1908, through his attorneys, he filed an answer contesting the grounds of divorce; the first verdict on the proceedings having been rendered on March 29, 1909, and the second verdict on September 22, 1909. It was objected to on the ground that the defendant on trial had never been identified as Le Roy C. Harding; also, that his marriage to Mary Ella Harding had never been established; that the state could only prove his marriage to her by an eyewitness or by proper certificate from the state or place where the marriage ceremony was conducted. The defendant was identified by witnesses as being Le Roy C. Harding, and there were circumstances identifying him as the person mentioned in the divorce suit. The objection on the ground of lack of identification is, therefore, not meritorious. Nor was the other ground good. The very object of introducing the proceeding, including the defendant's answer, was to show the fact of the former marriage. It was a quasi admission of the former marriage, that he answered the divorce proceedings, without denying it, though contesting the plaintiff's right to a divorce on other grounds. It is well settled that, on a trial for bigamy, the fact of the first marriage may be established by the admissions of the accused. Murphy v. State, 122 Ga. 149 (3), 50 S. E. 48; McSein v. State, 120 Ga. 175 (1), 47 S. E. 544.

5. One of the exceptions is that the judge erred in charging the jury in effect that the fact that the marriage to the first wife might be proved by the sayings or declarations of the defendant made at a time when he and the alleged first wife were living and cohabiting together as if they were man and wife. There was no error in this. On a trial for bigamy the fact of the first marriage may be established by the admissions of the accused, even though not made pending cohabitation with the alleged first wife. Murphy v. State. supra; McSein v. State, 120 Ga. 175, 47 S. E.

544, and cases cited. Further, the declarations of the alleged husband and wife pending cohabitation are admissible as a part of the res gestae. Drawdy v. Hesters, 130 Ga. 161 (3), 165, 60 S. E. 451, 15 L. R. A. (N. S.) 190. It is not true, as contended by the plaintiff in error, that in a prosecution for bigamy the state must prove the alleged prior marriage by an eyewitness or by a certified copy or by proper certificate from the state or place where the marriage was conducted, and must further directly prove that the marriage was lawfully solemnized according to the laws of the state where it took place. While the state must prove a lawful prior marriage—lawful according to the law of the state where celebrated or contracted—yet the proof may be circumstantial, as well as direct, and, where a married state is proved, it will be presumed, until the contrary appears, that it was lawfully contracted, in accordance with the laws of the state where the marriage took place. Dale v. State, 88 Ga. 552 (2), 555, 15 S. E. 287. See, also, Murphy v. State, supra.

6. Exception is taken to certain rulings of the court as to the admission of testimony. It will be sufficient to say that, if the court committed any error at all in these rulings, it was against the state, and not against the accused. The testimony was in relation to the state's attempt to prove the first marriage by circumstances. It is plain that the court struck out all evidence of the former marriage resting on reputation only. His ruling in this respect seems to be justified by a statement in the case of Arnold v. State, 53 Ga. 574—a bare, unsupported dictum. However, in the case of Drawdy v. Hesters, supra, there is a well-reasoned and well-considered opinion holding, on a trial involving the issue of marriage vel non, evidence of the general repute in the neighborhood is admissible. Though the rulings complained of in the present case are not such as to confer upon us the jurisdiction to make an authoritative ruling upon the question as to whether general reputation in the community as to the first marriage is admissible in a bigamy case or not, and, therefore, the intimation which we have given to that effect is obiter, what we have said makes it plain that, if the court erred at all it was against the state, and not against the accused.

7. We have gone carefully through the brief of the evidence. It authorizes the verdict. The contention of the defendant was that he is not the same person as Le Roy C. Harding, who married Mary Ella Hodges; that it was his twin brother who married her. The brief of the evidence is hardly in

legal form for our consideration, for lack of condensation in compliance with the statute. Nevertheless, we have read it and considered it, and we are not prepared to say that the jury made any mistake in their finding that the man on trial is the same man that entered into both marriages.

8. The alleged newly discovered testimony was essentially cumulative. It related to the question of whether the present defendant or his twin brother went under the name of Le Roy C. Harding. Further, while there is an affidavit from the defendant stating that he could not obtain this testimony by diligence, yet he gives no reason why he could not have done so. If he had a twin brother who went under the name of Harding, he knew that fact before the trial as well as he did afterwards, and knew that the neighbors in the community where they had lived would probably testify to the facts.

Judgment affirmed.

NOTE.—Sufficiency and Admissibility of Evidence to Establish Former Marriage.—The old rule, if it ever obtained as a distinctly recognized rule in bigamy prosecutions, that there must be strict or formal proof of the prior marriage, seems to have little or no recognition in this country. The main conflict is as to the sufficiency of proof to support a conviction where admissions, conduct and reputation are relied on.

It has been held that admissions alone are not sufficient. *State v. Johnson*, 12 Minn. 476, 93 Am. Dec. 241; *State v. Cooper*, 103 Mo. 266, 15 S. W. 327. And contrariwise *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *State v. Wylie*, 110 N. C. 500, 15 S. E. 5. Mere cohabitation seems by itself wholly insufficient. *State v. Johnson*, *supra*; *State v. Cooper*, *supra*. Likewise is this true as to mere reputation. *Addison v. State*, 34 Tex. Cr. 296, 30 S. W. 357.

The following case shows well the necessity of the concurrence of proof.

In *People v. Hartman*, 130 Cal. 487, 62 Pac. 823, the view of the court seems to be that general repute as to the relationship between defendants and an alleged former wife is admissible, but in itself not sufficient to sustain a conviction. The court's summary of what was shown in that case was that there was evidence showing cohabitation for many years, undivided general repute of marriage, admissions by defendant of marriage and some evidence to show the performance of an actual marriage ceremony. "These things, taken together, are ample to support" a finding of the fact of a former marriage.

And the following holds the reverse: In *State v. Pendleton*, 67 Kan. 180, 72 Pac. 527, it was said: "In the present case there was no direct evidence of the first marriage or of the actual fact of cohabitation, the prosecution relying wholly upon testimony as to admissions and reputation and circumstantial evidence. In several states the rule has been adopted that the first marriage must be established by positive proof of the very fact of marriage, as distinguished from a marriage that may be inferred

from circumstances." This theory the court rejects. The court also refuses to declare that in the absence of such direct proof there must be proof to show "the three elements of admissions, cohabitation and reputation," and it refuses to subscribe to this rule, but holds that: "There is nothing peculiar about an allegation of this kind, requiring unusual treatment, but it may be proved by any competent evidence, direct or circumstantial, the same as any other fact." It is conceded, however, there are many well-considered decisions to sustain the view that was rejected. The remaining cases are set forth sufficiently to show how they stand.

In *State v. Goulden*, 134 N. C. 743, 47 S. E. 450, the only evidence of the former marriage seems, as the case is reported, to have been that about three weeks before this second marriage defendant was charged with the existence of his first wife and he replied: "I wish I could hear she was dead so I could be a free man." This was held admissible and a conviction was sustained.

In *State v. Gallagher*, 20 R. I. 266, 38 Atl. 655, it was said to be well settled in that state that "admissions of the accused are competent evidence of the fact of marriage. Though there are denials of this doctrine, yet it is sustained by the great body of the cases, English and American. See the numerous cases in 1 Bish. Mar Div. and Sep., sec. 1058, note."

This case cites *State v. Medbury*, 8 R. I. 513, where the question is very elaborately treated, and it was argued that cases for criminal conversation, where the fact of marriage must be proved directly, should be distinguished from prosecutions for bigamy.

In *Crane v. State*, 91 Tenn. (10 Pickle) 86, 28 S. W. 317, the opinion reviews cases to the effect that in this country there should be a modification of the rule that a valid marriage should be strictly proved, because of the migratory habits of its people and its large infusion of a foreign element makes this often impossible, and going upon this theory it was held that a statute of that state providing among other things that a "public acknowledgment of the party charged", with bigamy, shall be competent evidence as to both marriages, does not mean an acknowledgment before a court or other public tribunal, but it includes an acknowledgment by confession or conduct in the presence of one or more individuals. It need not be in the shape of a public avowal, made in the courts, or in the market place, or from a house-top, "but can be as well by acts and conduct recognizing the marriage, or by oral statements to third persons."

The following case shows an opening of the door, under circumstances, in respect to admissions not made to third persons:

In *Caldwell v. State*, 146 Ala. 141, 41 So. 473, the question was as to the admissibility of certain letters written by defendant to one whom he addressed as his wife and subscribed himself as her husband, and these were held competent as supplementing evidence of a witness to the ceremony and to their living together as husband and wife. The objection that this was "to allow proof of confidential and private communications between husband and wife, not intended to be made public," was overruled. It was said "there was no fact of a private or confidential nature disclosed by the letters, and hence under the cir-

cumstances of this case * * * we are unable to reach the conclusion that any public policy would be infringed or the peace of the family disturbed" by their admission.

In *People v. Penniman*, 72 Mich. 154, 40 N. W. 425, Judge Campbell shows that eye-witnesses are preferred to documentary evidence because by the latter "there is always possibility of mistaken identity," but there is nothing said about other sorts of proof.

It seems that the later cases generally reject the absolute necessity of positive proof of the very fact of marriage. Statutes, however, in many states provide in regard to these matters, and we have seen in *Crane v. State*, *supra*, how the latter view may affect their construction.

C.

JETSAM AND FLOTSAM.

SMALL HOLDINGS ACT AND COURTS OF JUSTICE.

In a recent address the Lord Chief Justice called attention to the tendency of present day legislation to confer duties of a judicial nature on various government departments, to the exclusion of courts of justice. The movement in this direction has been going on for some years; but although unimportant in the early stages, it is now assuming such proportions that the time has arrived when the whole principle deserves serious consideration. If this method of procedure has been introduced because of the expense, or because of the fact that the courts are already over-crowded with work, then these evils must be remedied, rather than that persons affected should not have recourse to the courts of justice.

We do not wish to suggest that the government departments have not, up to the present, discharged these duties in a careful and satisfactory manner. They have probably come to a wise decision in most instances; but the falseness of the position arises from the fact that they lack the independence which is the finest characteristic of a judge. They may be, perhaps, unconsciously affected by party spirit. They are not required to give reasons for their actions. Their decisions form no binding precedents, and there are no appeals. There may be a local inquiry before the decision is given, but this inquiry is not held by the person who actually decides, and, in fact, his view may be, and sometimes is, overruled by persons in authority over him.

These are objections to the system when everyone is trying conscientiously and impartially to perform his duties. Suppose we had at any time at the head of a government department a man or men who allowed party spirit to sway their decision, or men who were not conscientious, men who had selfish and personal ends to serve. Could their decisions be tolerated for one moment? Could such men be allowed to deprive another citizen of his rights or property, and that citizen have no appeal, and no power to come to the king's courts for protection? Yet such is one of the possible results of this new form of legislation.

In some instances the courts might intervene. If a government department exceeded its jurisdiction, or if a person who had judicial functions to perform was too much affected by interest to give an unbiased decision, possibly a remedy might be forthcoming, although in the latter case the evidence would be difficult to provide. A form of clause has, however, been adopted, which even makes this remedy doubtful, and we must confess that this method of legislation fills us with grave misgiving. England has been credited with the fairest and most independent judicial staff in the world, and Englishmen may well feel jealous of their rights of appealing to it.

From this point of view the case of *Ex parte Ringer* (1909), 73 J. P. N. 360, 25 T. L. R. 718, deserves attention. To quote from the judgment of Jelf, J., "This case presented an illustration of the length to which parliament had the right to go in ousting the powers and jurisdiction of the courts of law. If a majority in parliament were successful in passing an act of parliament which had that effect, then the jurisdiction of the courts of law in matters in which some people might think it was desirable that even government departments should be under the control of the courts, was nevertheless ousted, and the court had no power to interfere with the decision of the department."

The case itself arose out of proceedings to take land compulsorily for the purposes of the Small Holdings and Allotments Act, 1908, 8 Edw. 7, c. 36. The procedure is governed by sections 38 to 43 and schedule I. When it is desired to take land compulsorily, the council (in this case the Norfolk county council) are empowered to make an order putting in force, as respects the land specified in the order, the provisions of the Lands Clauses Acts with respect to the purchase and taking of land otherwise than by agreement. This order requires to be confirmed by the board of agriculture and fisheries, and if there are objections the board must cause a public inquiry to be held in the locality, and before confirming the order must consider the report of the person who held the inquiry, and all objections made thereto. The board may alter the order as they think fit, but once it is confirmed, it becomes final, and has effect as if enacted in the Small Holdings and Allotments Act. But, further, clause 39 (3) of that act provides that "the confirmation by the board shall be conclusive evidence that the requirements of this act have been complied with, and that the order has been duly made and is within the powers of this act." It seems, therefore to follow that if the board confirmed the order without considering the report of the person who held the inquiry, or sanctioned the taking of more land than was required, or of land to be used for some wholly different purpose, or if they acted in a partial or impartial manner, yet, nevertheless, the order is to be deemed duly made, and to be within the powers of the act.

The case in question did not go so far as to allege any such improper act. In section 41 of the act there is, however, a provision that the board, in confirming the order, must, so far as practicable, avoid taking an undue or inconvenient quantity of land from any one owner, and for that purpose, where part only of a holding is taken, the board must take into consideration the size and character of the existing

agricultural buildings not proposed to be taken, which were used in connection with the holding, and the quantity and nature of the land available for occupation therewith.

The court found themselves powerless in the matter. They considered that the provision referred to above was quite conclusive of the matter. The section gave to an order confirmed by a public department the absolute finality and effect of an act of parliament, and the court could no more set aside such an order than they could set aside an act of parliament. It was said by counsel in moving for the rule that the farming interest in Norfolk had been so hard hit by the act that they desired to bring this matter before the court in order that they might be assured that the act was being properly administered. The answer they have received is that the courts have been rendered powerless by the act. Possibly, when the application was made they did not expect very much more. They have, however, obtained a judicial interpretation of this clause, and they have at least succeeded in calling the attention of the country to a form of legislation which may have some merits, but which is nevertheless contrary to the true principles of government, and which, in the hands of unscrupulous persons, might be made a terrible weapon of injustice.

The case we have referred to is not a solitary instance of the courts to interfere with a semi-judicial decision by a government department. Thus, in *R. v. The Local Government Board* (1908), 72 J. P. 211, a number of the Metropolitan borough councils desired to question a decision of the defendant board, on the ground that the board had wrongly interpreted a section of the London Government Act, 1899. Here, again, the court held that they were powerless to assist the applicant.—*Justice of the Peace.*

BOOK REVIEWS.

SUTHERLAND ON CODE PLEADING PRACTICE AND FORMS.

Mr. William A. Sutherland, of the California Bar, has proposed a work in four volumes showing the code system, particularly as exemplified in legislation of the Pacific slope, of which the two first volumes have appeared.

There is set forth substantial law with every proposition in the text based on authority cited thereto. In addition there are given and to be given in the completed work more than nineteen hundred forms.

The author appreciates that citation of authority could be extended almost indefinitely in a work of this character and in the preface it is stated that "merely cumulative authorities have been omitted and cases have multiplied only where they are of illustrative value."

The volumes will be of practical use in all code states, as the industry of the author in his compilation of decided points, and the arrangement of this for practical use appears to be very remarkable.

The author says the series will embrace no fewer than 1,900 forms "the great majority of which have been judicially approved."

This series cannot but be of very great utility to the practitioner and the case law needed

is put practically at one's elbow in double citations of original reports and those of the West system.

In addition to citation of judicial authority there is much reference to code sections, the substance of the statutory rule being given in the text.

While, noticeably, the bulk of the cases cited are of the states above mentioned, there is a considerable part from elsewhere. Thus we see cases from Alabama, Kansas, New York, Iowa, Missouri, Massachusetts and various other states.

It is conceivable, that a treatise of this nature might command an almost infinite multiplication of authority and, therefore, the author tells us that "merely cumulative authorities have been omitted, and cases have been multiplied only when they are of considerable illustrative value."

The work is bound in law buckram, the paper of a most excellent quality, the text in clear print agreeable to the eye and issues from the publishing house of Bancroft-Whitney Company, San Francisco, 1910.

HUMOR OF THE LAW.

A long-winded, prosy counselor was arguing a technical case recently before one of the judges of the superior court. He had drifted along in such a desultory way that it was hard to keep track of what he was trying to present and the judge had just vented a very suggestive yawn.

"I sincerely trust that I am not unduly trespassing on the time of this court," said the lawyer with a suspicion of sarcasm in his voice.

"There is some difference," the Judge quietly observed. "between trespassing on time and encroaching on eternity."—*Philadelphia Ledger.*

"What kind of a career have you mapped out for your boy Josh?"

"I'm going to make a lawyer of him," answered Farmer Corntossel. "He's got an unconquerable fancy fur tendin' to other folks' business, an' he might as well git paid for it."—*Washington Star.*

Old Lawyer (to young partner)—Did you draw up old Moneybag's will?"

Young Partner—Yes, sir, and so tight that all the relatives in the world cannot break it.

Old Lawyer (with some disgust)—The next time there is a will to be drawn up I'll do it myself.

Judge—Then, when your wife seized the weapon you ran from the house?

Plaintiff—Yes, sir.

Judge—But she might not have used it.

Plaintiff—True, your Honor. Maybe she picked up the flatiron just to smooth things over.—*Daily Socialist.*

Opposing Counsel—"A chap told me this morning that I looked the image of you." "Where is the idiot? I'll pound the life out of him." "Too late. I killed him."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Report, and of all the Federal Courts.

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1. **Adjoining Landowners**—Injuries From Blasting.—Negligence need not be shown, to recover for damages to adjoining property from blasting and other operations in the construction of a railroad tunnel, causing concussion, though no matter was thrown on the adjoining land.—*Hickory v. McCabe & Bihler*, R. I., 75 Atl. 404.

2.—Negligence.—In case of injury to adjoining property by the falling of a wall, the burden is on the owner to exculpate himself.—*Teepen v. Taylor*, Mo., 124 S. W. 1062.

3. **Action**—Joiner.—Claims against an executor in his representative capacity and claims against him as an individual cannot be joined in the same action.—*Mailly v. Elliott*, N. J., 75 Atl. 472.

4. **Appeal and Error**—Appealable Orders.—An appeal from a non-suit before final judgment will not lie.—*Barker v. Thomas*, S. C., 67 S. E. 1.

5. **Attorney and Client**—Effect of Compromise of Action.—The client, as long as he acts in good faith, without intent to defraud, held to have the right to compromise and settle his cause of action with or without the consent of

his lawyers.—*Hurr v. Metropolitan St. Ry. Co.*, Mo., 124 S. W. 1057.

6.—Knowledge of Attorney.—That a grantee directed the grantor's attorney to examine the title and execute the conveyances did not charge the grantee with the attorney's knowledge of the grantor's fraudulent intent.—*Rogers v. Driscoll*, Tex., 125 S. W. 599.

7. **Bail**—Custody of Accused Pending Rehearing.—A defendant convicted of a criminal offense, and whose conviction has been affirmed by the Circuit Court of Appeals while he was at large on bail, will not be remanded to custody pending a motion for rehearing unless some unusual reason is shown why he is not likely to remain within the jurisdiction.—*Walsh v. United States*, U. S. C. C. of App., Seventh Circuit, 174 Fed. 621.

8. **Bankruptcy**—Appointment of Receiver.—An ex parte order appointing a receiver for an alleged bankrupt held erroneous.—*In re Oakland Lumber Co.*, U. S. C. C. of App., Second Circuit, 174 Fed. 634.

9.—Appointment of Trustee.—On the appointment of a trustee in bankruptcy, his title relates back to the date of adjudication.—*In re Frazin & Oppenheim*, U. S. D. C., S. D. N. Y., 174 Fed. 713.

10.—Discharge.—A discharge of a judgment debtor in bankruptcy held to have released the principal and sureties on his six months bond to release him from arrest on a judgment provable in bankruptcy.—*Almon H. Fogg Co. v. Bartlett*, Me., 75 Atl. 380.

11.—Involuntary Proceedings.—An involuntary bankrupt is entitled as of right to a jury trial only as to his insolvency and acts of bankruptcy alleged.—*Carpenter v. Cudd*, U. S. C. C. of App., Fourth Circuit, 174 Fed. 603.

12.—Landlord and Tenant.—A landlord, having accepted rent from the trustee, waived his right to re-enter because of the lessee's bankruptcy, authorizing a sale of the lease by the trustee.—*In re Frazin & Oppenheim*, U. S. D. C., S. D. N. Y., 174 Fed. 713.

13.—Member of Stock Exchange.—On the bankruptcy of a member of a stock exchange, the proceeds of the sale of his seat and of closed transactions pass to his trustee, subject to be applied in accordance with the rules of the exchange as against general creditors.—*In re Gregory*, U. S. C. C. of App., Second Circuit, 174 Fed. 629.

14.—Rights of Trustee.—A trustee in bankruptcy can recover a fund held in trust for the bankrupt under a passive trust without protecting the trustee against liability on notes which he had indorsed for the bankrupt.—*Wallace v. Everett*, Ky., 125 S. W. 745.

15.—Wage-Earners.—The president of a corporation drawing a salary of \$900 a year, held not a wage-earner.—*Carpenter v. Cudd*, U. S. C. C. of App., Fourth Circuit, 174 Fed. 603.

16. **Banks and Banking**—Agreement Not to Negotiate Note.—A negotiable instrument cannot be affected in the hands of an innocent purchaser for value by a contemporaneous oral agreement between the original parties that it should not be negotiated.—*Bothell v. Fletcher & Stobaugh*, Ark., 125 S. W. 645.

17. **Benefit Societies**—Beneficiaries.—The beneficiary under a life policy, having murdered in-

sured, held to have no right of recovery on policy.—*Anderson v. Life Ins. Co. of Virginia*, N. C., 67 S. E. 53.

18. **Bills and Notes—Consideration.**—The consideration of promissory note may as between parties be attacked, and a total failure of consideration will bar a recovery thereon.—*Pyle v. Gallaher*, Del., 75 Atl. 373.

19. **Purchase After Maturity.**—The purchaser of a note after maturity from an agent of the maker, who had paid it for the maker, and reissued it without authority, held to have no remedy against the maker.—*Thiel v. Butker*, La., 51 So. 500.

20. **Boundaries—Beginning Corner.**—The beginning corner is of no higher dignity than any other corner of a survey of land.—*Ramseaur v. Ball*, Tex., 125 S. W. 590.

21. **Breach of Marriage Promise—Renunciation of Contract.**—An offer of performance by a person renouncing a contract of marriage, after the other party has brought suit for breach thereof, held not to bar recovery.—*Connolly v. Bollinger*, W. Va., 67 S. E. 71.

22. **Brokers—Contract.**—While a broker who voluntarily brings a purchaser to the owner of land is not entitled to commissions, if he endeavored to sell it with the owner's knowledge, there is a sufficient consideration for the latter's promise to pay for the broker's services when a purchaser is procured.—*Dockery v. Maple*, Tex., 125 S. W. 631.

23. **Cancellation of Instruments—Restoration of Consideration.**—On the cancellation of a deed by a married woman on the ground that her husband did not join therein, the grantor must restore the consideration, and the grantee has a lien for such amount.—*Mays v. Pelly*, Ky., 125 S. W. 713.

24. **Carriers—Bill of Lading.**—Where the consignee in a bill of lading indorsed thereon a direction to deliver to the third person, the latter held entitled to sue for damages for subsequent delay.—*Moore v. Atlantic Coast Line R. Co.*, S. C., 67 S. E. 11.

25. **Carriage of Goods.**—A railroad's liability as a carrier ceases and becomes that of warehouseman only, when the consignee has had a reasonable time within which to remove the goods after their readiness for delivery at destination.—*Knight v. Southern R. Co.*, S. C., 67 S. E. 16.

26. **Estoppel.**—A shipper held not estopped to claim that transfer of bill of lading passed only the transferee's title.—*Webster v. Baer*, Mo., 125 S. W. 815.

27. **Injury to Guest in Bus.**—A person invited by defendant's bus driver to ride without fare held entitled to the same rights as a passenger.—*Palmer Transfer Co. v. Smith*, Ky., 125 S. W. 725.

28. **Limitation of Liability.**—As to interstate shipments, a common carrier cannot contract for exemption from liability for injuries resulting from his own negligence.—*Gilliland & Gaffney v. Southern Ry. Co.*, S. C., 67 S. E. 20.

29. **Limitation of Liability.**—Where a shipper had no opportunity to ship under any other than a contract of limited liability, he was entitled to recover for the loss of the goods, regardless of the contract.—*Southern Express Co. v. R. H. Meyer Co.*, Ark., 125 S. W. 642.

30. **Negligence.**—A common carrier of

passengers is not an insurer of their safety, but is only liable for injuries caused by its negligence.—*Eaton v. Wilmington City Ry. Co.*, Del., 75 Atl. 369.

31. **Passengers.**—Plaintiff held a passenger while on defendant's platform at a junction, and defendant liable for damages caused by the misdirection of its porter as to the train plaintiff should have taken.—*Bullock v. Atlantic Coast Line R. Co.*, N. C., 67 S. E. 60.

32. **Carriers of Goods—Limitation of Liability.**—A contract for an interstate shipment of goods, limiting the liability of the carrier to loss occurring while the goods were in its possession and the damages to a stated amount, was void in these particulars and cannot affect the shipper's right to recover for their loss.—*Southern Express Co. v. R. H. Mayer Co.*, Ark., 125 S. W. 642.

33. **Chattel Mortgages—Defective Description.**—A defect in the description of the personality in a mortgage is cured by the subsequent delivery of the personality to the mortgagor as against the general creditors of the mortgagor.—*Cuddy v. Becker, Mayer & Co.*, Iowa, 124 N. W. 1071.

34. **Description of Mortgaged Chattels.**—A description of the mortgaged chattels as "two yoke of oxen, known as the J. L. Kirk oxen," was sufficient.—*Reeves v. H. C. Allgood & Co.*, Ga., 67 S. E. 82.

35. **Mistake in Maker's Name.**—An error in the name of the mortgagor appearing in the body of a chattel mortgage held not to invalidate it.—*Payne v. King*, Mo., 124 S. W. 1066.

36. **Constitutional Law—Determination of Constitutional Questions.**—The court will not consider an objection to the constitutionality of a statute made by a party whose rights it does not affect and who has no interest in defeating it.—*Bial v. Franklin*, R. I., 75 Atl. 399.

37. **Legislative Powers.**—A statute in the nature of a supplemental charter, enacted to take effect on its adoption by the governing body of the municipality, is not a constitutionally enacted law.—*Booth v. McGuinness*, N. J., 75 Atl. 455.

38. **Right to Trial by Jury.**—A summary trial without a jury for violation of a city ordinance, and a sentence to pay a \$500 fine and to work upon the streets for 30 days, held not violative of Const. art. 1, sec. 1, par. 3, nor of Const. U. S. Amend. 14, sec. 1.—*Loeb v. Jennings*, Ga., 67 S. E. 101.

39. **Contracts—Credit Insurance.**—As between the parties to a contract it is no objection that it was postdated.—*American Credit Indemnity Co. of New York v. Hecht & Co.*, Ky., 125 S. W. 697.

40. **Corporations—Criminal Responsibility.**—A corporation in the hands of a receiver appointed by a federal court held not criminally liable for the acts of the agents of the receiver obstructing a public road contrary to a state statute.—*State v. Norfolk & S. Ry. Co.*, N. C., 67 S. E. 42.

41. **Interest in Profits.**—A shareholder in a corporation has no property interest in the profits of the business carried on by the corporation until a dividend has been declared out of such profits.—*Pyle v. Gallaher*, Del., 75 Atl. 373.

42. **Courts—Concurrent Jurisdiction.**—The state court and United States court held to have concurrent jurisdiction of an action for injury

or death, under the federal employers liability act.—*Lemon's Adm'r v. Louisville & N. R. Co.*, Ky., 125 S. W. 701.

43. Criminal Trial—Venue a Jurisdictional Fact.—Venue must be proved by the prosecution as a part of a general case.—*Minor v. City of Atlanta*, Ga., 67 S. E. 108.

44. Damages—Action for Injuries.—In an action for injuries to a passenger by the sudden starting of the car as she was alighting, held proper to refuse an instruction that there was no evidence to support a verdict for punitive damages.—*Best v. Columbia Electric St. Ry., Light & Power Co.*, S. C., 67 S. E. 1.

45. Death—Burden of Showing Cause.—Where decedent's death results from one of two causes for only one of which defendant is liable, plaintiff must show with reasonable certainty that the cause for which defendant is liable produced the result.—*Kelly v. Union Pac. Ry. Co.*, Mo., 125 S. W. 818.

46. Dedication—Intention to Dedicate.—The marking of vacant lots on a plan for a park system dedicated to the public as "15x60" held not to imply dedication thereof.—*Brown v. Dickey*, Me., 75 Atl. 382.

47. Detinue—Verdict.—Where a verdict for plaintiff in detinue describes the property merely as "the property described in his declaration," a sufficient description in the declaration will supply the lack of it in the verdict.—*West Virginia Timber Co. v. Ferrell*, W. Va., 67 S. E. 69.

48. Discovery—Physical Examination.—The court has no power to require a plaintiff, suing for personal injuries, to submit to a physical examination by defendant's physicians or by physicians appointed by the court.—*Best v. Columbia Electric St. Ry., Light & Power Co.*, S. C., 67 S. E. 1.

49. Divorce—Liability for Wife's Attorney's Fees.—The mere filing of a motion by a husband suing for divorce, to dismiss the action, does not destroy the claim of the wife for alimony and attorney's fees.—*Varn v. Varn*, Tex., 125 S. W. 639.

50. Eminent Domain—Right of Exercise.—Eminent domain rights are attributes of sovereignty, to be exercised by the state with great caution and only in case of public necessity.—*Wise v. Yazoo City*, Miss., 51 So. 453.

51. Estoppel—By Deed.—A mortgagor in possession under deed of warranty, where no fraud or eviction is shown, cannot defend foreclosure of purchase money mortgage by setting up outstanding title.—*R. J. & B. F. Camp Lumber Co. v. State Sav. Bank*, Fla., 51 So. 543.

52.—Persons Affected.—An estoppel as against a third person on account of misrepresentation or the like will operate against his heirs.—*Thornton v. Ferguson*, Ga., 67 S. E. 97.

53. Evidence—Books of Account.—The results of voluminous facts or of the examination of many books and papers may be proved by the person who made the examination.—*Washington Horse Exch. v. Wilson & McCoy*, S. C., 67 S. E. 35.

54.—Consideration.—Parol evidence is always admissible between the parties to show want of consideration.—*Kessler v. Clayes*, Mo., 125 S. W. 799.

55.—Declarations as to Family History.—Declarations of deceased members of a family regarding its history are admissible in evidence.—*Flores v. Hovel*, Tex., 125 S. W. 606.

56.—Judicial Notice.—The court takes judicial notice of the custom that authority to a broker to sell land carries with it the obligation to furnish an abstract of title.—*Watkins v. Thomas*, Mo., 124 S. W. 1063.

57.—Ledger Entries.—An entry in a ledger, made by one of two defendants, was an original entry as to him, and admissible in evidence as against him.—*Becker v. Donalson*, Ga., 67 S. E. 92.

58.—Parol Evidence.—Where a note imports a legal obligation with certainty, parol evidence is inadmissible to destroy its obligation and show that it was in fact a mere recital.—*Kessler v. Clayes*, Mo., 125 S. W. 799.

59.—Parties to Deed.—Though grantees in a deed are described therein as husband and wife, it may be shown by parol that such is not the case.—*Hubatka v. Meyerhofer*, N. J., 75 Atl. 454.

60. Executors and Administrators—Collateral Attack.—An order granting administration and directing the sale of real estate to pay debts should be sustained on collateral attack, unless the record affirmatively shows that jurisdiction did not exist.—*Salas v. Mundy*, Tex., 125 S. W. 633.

61.—Foreclosure by Administrator.—Where an administrator, acting as such and also as agent for a third party, bought a note and mortgage given by intestate under a foreclosure, whereof the land was sold to such third party for an inadequate price, the deed held not to pass title as against the heirs.—*Morton v. Blades Lumber Co.*, N. C., 67 S. E. 67.

62.—Settlement of Claims.—A settlement by an administrator of his claim for negligent death of decedent, made in fraud of the rights of the beneficiaries, held subject to be opened at the instance of the beneficiaries.—*Leach v. Owensboro City Ry. Co.*, Ky., 125 S. W. 708.

63. Fire Insurance—State Regulation.—The state has an unquestioned right to regulate the business of insurance.—*State v. Alley*, Miss., 51 So. 467.

64. Frauds, Statute of—Oral Agreement to Act as Agent.—An oral agreement to act as agent in buying land is valid and not within statute of frauds.—*Conklin v. Kruger*, N. J., 75 Atl. 436.

65. Fraudulent Conveyances—Preferences.—It is the right of an individual who is failing or insolvent to prefer one of his creditors.—*Atlantic Refining Co. v. Stokes*, N. J., 75 Atl. 445.

66.—Preferences.—An insolvent debtor may pay certain of his creditors in full, and leave others unpaid, and may sell property for such purpose.—*Rogers v. Driscoll*, Tex., 125 S. W. 599.

67. Homestead—Transfer.—Where a wife does not join in the execution of a deed to a homestead, under Act March 18, 1887 (Acts 1887, p. 90), the deed is void and the grantee acquires no title.—*Mason v. Dierks Lumber & Coal Co.*, Ark., 125 S. W. 656.

68. Husband and Wife—Deed by Wife.—A deed by a married woman of her separate property in which her husband did not join being void, she is not bound by any statement that she will never question its validity.—*Mays v. Pelly*, Ky., 125 S. W. 713.

69.—Estate by Entireties.—To create an estate by entireties, the grantees must be husband and wife at the time of the convey-

ance.—Hubatka v. Meyerhofer, N. J., 75 Atl. 454.

70. **Indemnity Insurance**—Authority of Agent.—A provision of a policy that no agent should have power to waive any of its provisions held waived by the company's failure to repudiate a policy postdated by the agent.—American Credit Indemnity Co. of New York v. Hecht & Co., Ky., 125 S. W. 697.

71.—Renewals.—Renewal policy of credit insurance held to cover losses on goods sold within the time covered by the preceding policy.—American Credit Indemnity Co. of New York v. Hecht & Co., Ky., 125 S. W. 697.

72. **Injunction**—Wrongful Issuance.—In an action on an injunction bond, plaintiff's damages are limited to such as followed as the natural and proximate consequence of issuing the injunction.—Phoenix Pad Co. v. United States, Md., 75 Atl. 394.

73. **Interstate Commerce**—What Law Governs.—To the extent that U. S. Comp. St. Supp. 1909, pp. 1178, 1179, secs. 1, 2, fixes the duties and liabilities of the shipper and carrier in interstate transportation, it is controlling and displaces any state law on the subject.—Gilliland & Gaffney v. Southern Ry. Co., S. C., 67 S. E. 20.

74. **Intoxicating Liquors**—Sale by Druggists.—A druggist charged with selling intoxicating liquors without a prescription must, to escape a conviction, show that the prescription relied on was a legal one.—State v. Clinkenbeard, Mo., 125 S. W. 827.

75. **Judgment**—Amendment.—A party in court with actual knowledge of an amendment of the judgment, may not complain because of the absence of a formal motion therefor, and the service of notice on him.—Varn v. Varn, Tex., 125 S. W. 639.

76.—Default.—A default judgment in an action against a railroad for negligently killing a horse cannot be rendered, without first awarding a writ of inquiry to assess its value.—Mississippi Cent. R. Co. v. Crawford, Miss., 51 So. 466.

77. **Landlord and Tenant**—Ninety-nine Year Leases.—Leases for 99 years are valid both at the civil and common law.—State v. Board of Adm'rs of Tulane Education Fund, La., 51 So. 483.

78. **Life Insurance**—Action on Policy.—A person who had paid premiums on life policy and funeral expenses of insured held not entitled to sue on the policy, in which no beneficiary was named.—Marzulli v. Metropolitan Life Ins. Co., N. J., 75 Atl. 473.

79.—Non-Payment of Premium.—An agent of insurer without authority to make a new contract of insurance held without authority to waive a forfeiture for non-payment of a premium.—Crook v. New York Life Ins. Co., Md., 75 Atl. 388.

80. **Limitation of Actions**—Accrual of Cause of Action.—The statute of limitation does not begin to run until the right to sue has accrued.—Plitman v. Ball, Mo., 124 S. W. 1082.

81.—Non-Resident Corporations.—Ownership of property does not make a non-resident corporation a resident so as to put in force the statute of limitations which is suspended by Revision 1905, sec. 366, as to non-residents, nor does the appointment of a local agent on whom

process can be served.—Volivar v. Richmond Cedar Works, N. C., 67 S. E. 42.

82. **Master and Servant**—Assumption of Risk.—A servant over 14 years of age is presumptively endowed with sufficient intelligence to perform the work assigned to him, but the presumption may be rebutted.—Burnett v. Roanoke Mills Co., N. C., 67 S. E. 30.

83.—Contributory Negligence.—Where there was a safe method of unchoking a machine in a cotton mill, and the servant, contrary to the express instructions of the master, attempted to do so in an unsafe way and was injured, the master was not liable therefor.—Burnett v. Roanoke Mills Co., N. C., 67 S. E. 30.

84.—Contributory Negligence.—A servant, injured through the concurring negligence of himself and that of a fellow servant, cannot recover.—McMurray v. St. Louis, I. M. & S. Ry. Co., Mo., 125 S. W. 751.

85.—Discharge of Servant.—A traveling salesman's refusal to obey an unreasonable instruction as to where he should work, under the terms imposed by his employer, held not a voluntary quitting of his employment, or ground for his discharge.—Asinof v. Lasker, 121 N. Y. Supp. 375.

86.—Fellow Servant.—A master is liable for injuries to an inexperienced servant in consequence of his attempt to obey a negligent order of one in authority.—Holton v. John L. Roper Lumber Co., N. C., 67 S. E. 54.

87.—Safe Place to Work.—The rule requiring the master to use ordinary care to furnish a reasonably safe place for work is subject to the exception that the servant assumes risks resulting from changes made in the place of work by him in the ordinary progress of the work.—Wight v. Cumberland Telephone & Telegraph Co., Ky., 125 S. W. 718.

88.—Violation of Contract.—Where a person contracted to labor in consideration of advances already made, that he quit the service held not of itself to raise a presumption that he intended to defraud when he obtained the advances.—Raffield v. State, Ga., 67 S. E. 109.

89. **Mortgages**—Liens.—A mortgage of property to be acquired in the future is void against the mortgagor's creditors or purchasers for value.—Wender Blue Gem Coal Co. v. Louisville Property Co., Ky., 125 S. W. 732.

90. **Municipal Corporations**—Intoxicating Liquors.—All who violate or assist in violating a municipal ordinance, directly or accessorially, are equally guilty as principals.—Stradley v. City of Atlanta, Ga., 67 S. E. 107.

91.—Surface Waters.—A city may not collect surface water into drains or sewers, and discharge it in unusual quantities onto private property.—Lewis v. City of Springfield, Mo., 125 S. W. 824.

92.—Use of Highway.—The more dangerous the character of a vehicle used, and the greater its liability to do injury to others, the greater the degree of care and caution required in its use and operation on a street.—Cecchi v. Lindsay, Del., 75 Atl. 376.

93. **Negligence**—Children.—A child's conduct, considered from the standpoint of the ordinary child, may be contributorily negligent as a matter of law.—Henry v. Missouri Pac. Ry. Co., Mo., 125 S. W. 794.

94.—Contributory Negligence.—There is a

presumption that a child under seven years of age is not guilty of contributory negligence.—*Baker v. Public Service Ry. Co.*, N. J., 75 Atl. 441.

95. **Partition**—Special Interests.—A guardian having a special interest in the ward's property held entitled to purchase it at a partition sale.—*Credle v. Baughman*, N. C., 67 S. E. 46.

96. **Partnership**—Estoppel.—One who was never a partner in a business conducted in a firm name embracing his name, permitting such use of his name and representing himself to be a partner, held liable by estoppel as a partner.—*Cirella v. Palmieri*, 121 N. Y. Supp. 321.

97.—Existence.—Whether the facts constitute a partnership relation is a question of law; but whether the essentials of a partnership exist is a question of fact.—*Snowden v. Cunningham*, Fla., 51 So. 543.

98.—Loan of Money to Partner.—Though a person lending money to one partner could not recover from the partnership, if he suspected it was to be applied to other purposes, under Clv. Code 1895, sec. 2654, that the partner had previously negotiated a loan for a corporation was not ground for such suspicion.—*Bishop v. People's Bank of Calhoun*, Ga., 67 S. E. 119.

99.—Notes.—A partnership note, signed by one member after dissolution, held binding upon the firm in favor of a creditor receiving it, if he had no notice that it was signed after dissolution.—*Bank of Covington v. Cannon*, Ga., 67 S. E. 83.

100. **Payment**—Presumption.—The presumption of payment of a debt secured by a specialty after 20 years may be rebutted only by satisfactory and convincing evidence.—*Fidelity Title and Trust Co. v. Chapman*, Pa., 75 Atl. 428.

101. **Perpetuities**—Restraints Upon Alienation.—The rule that a condition prohibiting the conveyance for a certain time of land devised in fee simple is void as a restraint upon alienation does not apply in its strictness, where the devisee is to trustees, and not directly to beneficiaries.—*Christmas v. Winston*, S. C., 67 S. E. 58.

102. **Principal and Agent**—Agency to Execute Sealed Instrument.—Authority to an agent to execute a sealed instrument in the absence of a principal must be in writing under seal.—*Dalton Buggy Co. v. J. H. Wood, Son & Bro.*, Ga., 67 S. E. 121.

103.—Authority of Agent.—The authority of an agent may not be shown by his own declarations.—*Becker v. Donalson*, Ga., 67 S. E. 92.

104. **Principal and Surety**—Consideration.—A naked agreement between a principal maker of a note and the payee to extend the time of payment without consideration held not to discharge a surety.—*Bartlett v. Pittman*, Me., 75 Atl. 379.

105. **Railroads**—Care Required.—A carrier must exercise the utmost care for the safety of its passengers that would be used by very cautious persons under the same circumstances.—*Brady v. Springfield Traction Co.*, Mo., 124 S. W. 1070.

106.—Crossing Accidents.—It would constitute negligence for a railroad, at a place where gates were maintained, to keep the gates up, whereby one drove an automobile on tracks, and was injured by train.—*Louisville & N. R. Co. v. Eckman*, Ky., 125 S. W. 729.

107. **Receivers**—Sale of Property.—A sale of

property by a receiver to himself, to his wife, or to a corporation in which he is a director, is contrary to public policy, and voidable.—*South Georgia Bldg. & Inv. Co. v. Mathews*, Ga., 67 S. E. 127.

108. **Sales**—Immoral Consideration.—A contract for the sale of furniture, on credit, to the keeper of a bawdyhouse, with the knowledge that it was to be there used, held not illegal.—*Belmont v. Jones House Furnishing Co.*, Ark., 125 S. W. 651.

109.—Sale by Sample.—In an action for the price of goods sold by sample, the burden is on the seller to show that the goods were up to the sample.—*Bodenmann Mfg. Co. v. Lesser*, 121 N. Y. Supp. 335.

110.—Warranties.—Where plaintiff sold defendant a second-hand sewing machine, his statement that it was in very good condition was only an expression of opinion.—*Ginsberg v. Lawrence*, 121 N. Y. Supp. 337.

111. **Specific Performance**—Sufficiency of Performance by Plaintiff.—A party desiring to enforce a contract must show that he has done, or offered to do, all on his own part which would cast upon the other party the duty of doing what he is undertaking to force him to do.—*Curtis v. Sexton*, Mo., 125 S. W. 806.

112. **Street Railroads**—Use of Streets.—Though street cars are rightfully in the streets and have a right-of-way, pedestrians may also rightfully use the streets, and until they are aware of the approach of the car, they may walk across the tracks.—*Leach v. Owensboro City Ry. Co.*, Ky., 125 S. W. 708.

113. **Taxation**—Sale of Land for Taxes.—A sale of more land than is necessary to pay the taxes is invalid.—*Stevens v. Goodenough*, Vt., 75 Atl. 398.

114. **Vendor and Purchaser**—Bona Fide Purchasers.—A vendor in a conditional sale failing to file the contract, cannot interfere with a bona fide purchaser of the property sold.—*Mathews Piano Co. v. Markle*, Neb., 124 N. W. 1129.

115.—Bona Fide Purchasers.—Where the vendor of a railroad right-of-way informed the agent of the company that he held only a life estate, the company cannot claim to be a purchaser without notice as to the remaindermen.—*Southern Ry. Co. v. Carroll*, S. C., 67 S. E. 4.

116.—Estoppel of Purchaser.—Where a person is let into possession of land under a contract of sale, he is a tenant at will of the vendor, and the principle that a lessee cannot dispute the lessor's title extends to him.—*Bond v. Beverly*, N. C., 67 S. E. 55.

117.—Recitals in Conveyance.—If in deranging title, one deed refers to another, the purchaser is constructively bound by all that the deed referred to would have disclosed, and buys subject to any infirmity there discoverable.—*Smith v. Fuller*, N. C., 67 S. E. 48.

118.—Tender of Deed.—Where plaintiff had the right, under a contract with defendant and his then partner, to reconvey land purchased of them for a certain consideration, his notice of election, accompanied by a demand for more than was due him under the contract, was insufficient.—*Curtis v. Sexton*, Mo., 125 S. W. 806.

119. **Wills**—Construction.—It will be presumed, in the absence of language in a will repelling the inference, that the language used was employed in the light of the settled meaning which the law attaches thereto.—*Clore v. Smith*, Ind., 90 N. E. 917.

120.—Construction.—If it is doubtful whether a legacy is vested in contingent, the doubt must be dissolved in favor of a vested estate.—*In re Smith's Estate*, Pa., 75 Atl. 425.

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NEGOTIABLE INSTRUMENTS LAW AS AFFECTING DRAWEE BANK PAYING A FORGED CHECK.

Two of the Missouri Courts of Appeal have recently held, that the Negotiable Instruments Law has foreclosed question whether the bank upon which a forged check is drawn, may, after payment of same, recover from a bona fide holder who presents same for payment, both courts ruling adversely to the bank. *Bank of Rolla v. First Nat. Bank*, 125 S. W. 513; *National Bank of Commerce in St. Louis v. Mechanics' American Bank*, 127 id. 429. These rulings were possibly *obiter*, because the same conclusion was reached in each case upon other grounds. In the latter case, however, the opinion plants itself mainly upon the proposition, that such is the effect of the Negotiable Instruments Law. In the former case reference to this Law is more incidental.

The opinion in the latter case regards this result as being so certain that the writer thereof saw "no necessity for elaborate discussion" or for expressing any leaning to either of the "opposing lines of decision, each emanating from courts of the highest authority and most reputable standing for judicial learning," at the same time admitting that in neither of these lines is there found any reference to the Negotiable Instruments Law.

Naturally one would be led to wonder whether or not a statute, which by the efforts of the Commissioners on Uniform Laws has been enacted in thirty-five states, really suppresses, or should be construed to suppress, such a formidable conflict in decision as has existed on this subject.

The section relied on by the Missouri courts is 62, which reads: "The acceptor by accepting the instrument engages that he will pay it according to the tenor of his acceptance; and admits: (1) The existence of the drawer, the genuineness of his signature and his capacity and authority to draw the instrument, and, (2) the existence of the payee and his capacity to indorse," and, in connection therewith, sections 185 and 188.

Section 185 says: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check," and section 188 says: "Where the holder of a check procures it to be accepted or certified, the drawer and all indorsers are discharged from all liability thereon."

Both of these courts consider that payment is at least the equivalent of acceptance and one of them quotes another like court of that state that: "A payment of the bill is more than an acceptance, for the one is an obligation to pay; the other a discharge of the indebtedness represented by the bill."

The great abundance of conflicting cases give fair right to presume, that such a statute, drawn to be proposed to all the states, should have been intended to allay this conflict, and it is not going too far to say that the learned Commissioners on Uniform Legislation made a great omission if they overlooked this conflict. It seems to us, indeed, that these Missouri cases have made a very important discovery in commercial law, if their conclusion is well-founded.

Nevertheless our view is rather, that the fault is with the Commissioners than with the courts which have failed to refer to this law, as the position taken by the Missouri courts seems to us without support.

It is to be noted, that section 185 does not say a check is to be regarded like a bill of exchange, but only like "a bill of exchange payable on demand," and section 188 makes acceptance of a check operate a very different result from the acceptance referred to by section 62. Acceptance of a check constitutes, in legal effect, its reissue by a bank. No one will hardly contend that acceptance, by the drawee of a bill of exchange, which needs to be presented for acceptance, discharges the drawer and indorsers. The contrary is the case. It must be presented for acceptance, without unreasonable delay or they will be discharged. Dan. on Neg. Ins., section 454.

The holder of a check therefore, agrees to an acceptance, instead of payment, at his own risk, while, in the other case, he is compelled to seek acceptance.

But we find further in Daniels on Negotiable Instruments, that: "There are some bills, such as are drawn payable immediately on demand, which are not presented for acceptance but for payment." Section 482. And by section 454 the author goes minutely into this and shows there are even other bills not payable on demand, but at a fixed time from date, which need not be presented for acceptance to prevent drawer and indorser from being released. It is only when the period of liability becomes fixed by presentment, that this must be made.

Assuming that this standard work states well-settled commercial rules, and for the text there is cited much authority, may it not also be assumed, that section 62, refers to other instruments than those which need no presentment for acceptance, and that at all events it does not refer to bills of exchange payable on demand?

Mr. Daniels speaks of the custom of presenting bills payable within a fixed time after date for acceptance, but he cites authority to the effect that an agreement not to present for acceptance will not release

an indorser. Section 62, therefore, might contemplate all paper other than that payable on demand, but it seems scarcely possible it refers to such as is.

But there seems to us other reasons why payment should not be regarded as the equivalent of acceptance, with all the force and effect given to the latter by the terms of section 62, especially when it is attempted to apply its provisions to an instrument payable on demand. In the first place, payment does not continue the career of the instrument, so that subsequent indorsers might be prejudiced. It stops its course just as effectually as refusal to pay or to accept, and it vouches for nothing. In the second place, the status of parties existing at the time of presentment for payment is not changed to their hurt.

Let us suppose an agreement by drawee bank to pay made to the holder of a forged check, but not evidenced according to commercial usage, and, when the paper is subsequently presented, closer inspection reveals a forgery, would not such an agreement be without consideration? If an agreement to pay is not enforceable, why should payment conclude the payor?

This reasoning, it is true, is along the line of the cases, which hold that payment does not preclude the drawee bank from resorting to the holder to whom payment is made, but it is in point as showing there is nothing in section 62, which should cause their conclusions to be restated.

The legal effect arising out of acceptance may be two-fold—it fixes the accrual of absolute liability of drawer and prior indorser and also makes of the acceptor an obligor to future indorsees. Under the negotiable instruments act, the acceptor of a check becomes the drawer.

But even in such case the inference does not seem irresistible that forged checks are also meant, because the contract of acceptance is presumed to have a consideration behind it. There could arise a consideration in detriment to a subsequent holder, but whence could come detriment to one procuring acceptance?

NOTES OF IMPORTANT DECISIONS

TELEGRAPH—DUTY TO USE TELEPHONE IN DELIVERY OF IMPORTANT MESSAGE RECEIVED AT NIGHT.—The Kentucky Court of Appeals, recognizing the ruling that the usual method to which a telegraphic company is bound to deliver a message is by messenger, also holds that when the time of day when messengers should be in waiting has passed, that use of a telephone may, under certain circumstances, be required of the company to give notice of its having been received. *Western U. T. Co. v. Price*, 126 S. W. 1100.

The court thus speaks: "The fact that a company may establish reasonable hours of service and be excused during specified hours and at certain places from delivering in person telegrams, will not relieve it of the duty, when its messenger is absent, of delivering an important telegram over the telephone, or at least of notifying the addressee that it has an important message for him, if it can communicate this information from its office without incurring any cost. * * * These corporations are public servants. They owe a duty to the public to exercise reasonable diligence to transmit and deliver in due time all messages received; and, when this can be done over the telephone, at no expense and without leaving the office, there is no reason why they should not be required to do it. It is true that the ordinary method of delivering telegrams is by messenger, and that the sendee is entitled to have delivered to him in writing the identical telegram received. But this rule of law will not, and should not, exonerate the company from using the telephone in cases where its business and the settled rules of law do not demand that it shall be prepared to promptly deliver the written message by hand."

The message in this case was from a distant city notifying a wife of the serious illness of her husband. At her residence and at the office of the company were telephones. The message was received before 10 p. m., but not delivered until after 8 a. m. the next day. Thereby she was prevented from going away either upon a train that night or the following morning, and arrived after her husband became unconscious before his death.

This is a somewhat flexible, not to say really a judge-made, rule, and how much it was made dependent upon the company being a "public servant," is uncertain. No authority is cited.

MASTER AND SERVANT—HUMANITARIAN DOCTRINE AS APPLIED TO EMPLOYEES OF A RAILROAD COMPANY.—At page 163 of 70 Cent. L. J. we submitted some criticism of a decision by Missouri Supreme Court holding that the humanitarian doctrine does not apply to employees working on a railroad with the same strictness as it applies to passengers or strangers. See *Degonia v. Ry. Co.*, 123 S. W. 807.

In other words, as applied to the facts, the holding was that where an employee's contributory negligence put him in danger of being run over and killed by an approaching train, he is not entitled in the same way, so far as liability of the railroad for his death is concerned, to warning giving opportunity for escape, as had he been a passenger or a stranger, though warning could have been given.

We cited several cases which we thought opposed to so harsh a ruling, and herein quote from the opinion of *Hallock v. Ry. Co.*, 90 N. E. 1124, decided by New York Court of Appeals, where the deceased was the station agent of the railroad. The New York court said:

"The deceased was aware that in compliance with his directions the switching, or cutting out of the freight cars was being carried on; that the work necessarily involved the movement of cars over the side track on which already some part of the freight train had three times passed. The track was straight for a long distance and the view thereover entirely unobstructed. With his knowledge of this situation, he loiters for at least two or three minutes on this track without looking to see if the movement of the trains thereon had ceased. The man with whom he was conversing observed the approach of the cars and escaped. The situation of the deceased was very different from that of a passenger, who would have the right to rely on the presumption that his path from the train to the station would be safe and unobstructed. Indeed, it seemed to be part of the duty of the deceased to have seen that the rules of the company, made for the safety and security of the passengers, was observed, instead of which he took no heed of their safety or of his own. In this respect we think he was guilty of negligence. Though it was through his own negligence that the deceased was in a place of danger, this would not excuse the negligence of the train crew in running him down after his dangerous position was apparent. *McKeon v. Steinway Ry. Co.*, 20 App. Div. 601, 47 N. Y. Supp. 374; *Austin v. New Jersey Steamboat Co.*, 43 N. Y. 75, 3 Am. Rep. 663; *Silliman v. Lewis*, 49 N. Y. 379."

Considering that the station agent was, in

effect, a vice-principal of defendant, this language seems not only against, but intensely opposed to, the doctrine laid down by the Missouri court.

The Missouri holding on this point was by a bare majority, but as to the New York case it is to be noted that there was a reversal and remand for new trial on other grounds. It might be claimed the point was not necessarily involved, further than if the Missouri doctrine were recognized there would have been merely a reversal. The decision, however, was unanimous, and the award of a new trial recognized the right of plaintiff to establish his case despite the negligence imputable to deceased.

The Kentucky Court of Appeals lately held that the failure of the foreman of a section gang to warn deceased of the approach of a fast passenger train (deceased being known to be of defective hearing) made the railroad liable for his death from being struck. *Chesapeake & O. R. Co. v. Richards*, 126 S. W. 1105. Contributory negligence does not appear to have been urged, and instructions asked by defendant seemed to concede that deceased was entitled to warning.

CARRIERS—STATE STATUTES REQUIRING THE FURNISHING OF CARS TO SHIPPERS.—The case of *St. L. S. W. R. Co. v. Arkansas*, 30 Sup. Ct. 476, considered along with *Houston & Tex. Cent. Railroad v. Hayes*, 201 U. S. 321, and other cases, exhibits very clearly that not only will the federal supreme court pronounce invalid statutes which upon their face are unreasonable as to "forbid the efficacious carrying on of interstate commerce," but it will examine closely into the evidence of a particular case to ascertain whether or not the excuse of a carrier for not furnishing cars under a valid statute should have been allowed.

In the case first above mentioned Mr. Justice White discussed carefully the opinion of the Arkansas Supreme Court in respect of its conclusions drawn from statements of fact. He recognizes as a material fact the regulations of the American Railway Association about the interchange of cars, and its control over the situation by reason of their governing 90 per cent of the railroads in the United States, and the consequent inability of one railroad to change such rules. Indeed, there seems a distinct recognition of the fact that reasonable rules adopted by railroads through the American Railway Association as their representative, may be the determining factor of whether or not the operation of such a statute may, in a particular case, be deemed an unreasonable interference with interstate commerce. Such

a combination as the American Railway Association is called lawful, when its regulations are reasonable.

Other special features of the particular case before the court are considered such as that the defendant in this case was one principally originating, rather than deriving, traffic, and the inference seems clear that wherever a railroad is proceeded against for penalties on failure to furnish cars under any of these cases, the case becomes appealable to the federal supreme court from any decision by the state court of last resort. Such was the appeal in this case, and there was no attack on the validity of the state statute, but the finding of the state court upon the merits was reversed.

For a further recent decision of one of these statutes, see *Wall Milling Co. v. Atchison, T. & S. F. R. Co.*, 108 Pac. 137, decided by the Kansas Supreme Court.

ARE EXECUTORY CONTRACTS OF MARRIAGE WHICH ARE NOT TO BE PERFORMED WITHIN ONE YEAR, WITHIN THE STATUTE OF FRAUDS?

Before undertaking the discussion of the exact subject of our thesis, let it be clearly understood that it is now well settled that executory contracts to marry do not come within the provision of the statute of frauds which avoid contracts not in writing, "made upon consideration of marriage." It is true that in a very early English case it was once thought that all promises to marry must be in writing, by reason of this section of the statute,¹ but the doctrine of that case was overruled in subsequent cases in England,² and was never followed in this country. This particular clause of the statute is now held to reach not mutual promises to marry, but ante-nuptial agreements by parties already under agreement to marry concerning property rights and other things, the consideration of which is the execution of the executory contract, to wit, the marriage itself.

But suppose an oral promise to marry is

(1) *Philpott v. Wallet*, 3 Lev. 65.

(2) *Cork v. Baker*, 1 Stra. 34; *Harrison v. Cage*, 1 Ld. Ray. 386.

not by its very terms to be performed within one year. May this fact be pleaded in defense to an action for a breach of this promise?

Strange as it may appear, there is no recorded English decision on this exact question. But the first case to arise in this country, and therefore to that extent the leading case in establishing the rule that such contracts come within the section avoiding agreements not to be performed within a year, was the case of *Derby v. Phelps*.⁵

In the Phelps case the defendant, who was then in school, orally agreed to marry plaintiff "at the end of five years," when he expected to be through his studies and settled in business. At the end of five years defendant refused to carry out his promise, and to plaintiff's petition for damages for breach of the promise, pleaded the statute of frauds, on the ground that the agreement to marry was not to be performed within one year.

The Supreme Court of New Hampshire, in upholding the defendant's contention, said: "This was an agreement which by the terms of it was not to be performed till the expiration of about five years; and hence comes within the very teeth of the statute. Had the tenor of the agreement been that the contract should be fulfilled on a certain event, which might or might not have happened within a year, but which in fact did not happen till after a year, the agreement would not have been within the statute. But such was not the tenor of it. Nor can this description of contracts be taken out of the statute by the circumstance, that when the original statute of frauds passed during the reign of Charles II., these contracts were not sued at law, but were merely the subject of proceedings to compel a performance of them in the ecclesiastical courts. For numerous kinds of contracts, not then in use and not then prosecuted in the common law courts, have since had birth under the new exigencies and improvements of society, and are all brought to the test of the general provisions of the statute."

(3) 2 N. H. 515.

The next case dealing directly with this question was *Nichols v. Weaver*.⁴ In that case the evidence was not clear when the contract was to be performed, but the jury made a special finding of fact under the trial court's instruction, that "the contract to marry was not to be performed within one year." On this finding the trial court set aside a general verdict for plaintiff and rendered judgment for defendant. The Supreme Court, relying exclusively on the case of *Derby v. Phelps*,⁵ affirmed the judgment for the defendant. The argument neither of counsel for plaintiff or the court question the fact that the statute of frauds avoids contracts to marry, if such contract is not to be performed within one year.

The next case holding such contracts within the statute of frauds when not to be performed within one year, is *Ullman v. Meyer*,⁶ where the court says: "As an original proposition it might be debated whether the statute of frauds was ever intended to apply to agreements to marry. They are agreements of a private and confidential nature, which, in countries where the common law prevails, are usually proved by circumstantial evidence, and at the time the English statute was passed were not actionable at law, but were the subjects of proceedings in the ecclesiastical courts to compel performance of them. Nevertheless, at an early day after such actions became cognizable in courts of law the defense of the statute of frauds was interposed, under that clause of the statute which denies a right of action upon any agreement made upon consideration of marriage unless the agreement is in writing; and although it was held that such clause only related to agreements for marriage settlements, there seems to have been no doubt in the minds of the judges that promises to marry were within the general purview of the statute."

Other cases often cited as sustaining the rule of law announced in the preceding

(4) 7 Kans. 373.

(5) Supra.

(6) 10 Fed. 241. (Construing the New York statute).

cases, while they do not directly announce the rule that executory contracts to marry are within the general purview of the statute of frauds, do so indirectly by exempting the facts of the particular case from the operation of the section we have just considered.⁷

The first note of dissent to this rule was sounded in the case of *Blackburn v. Mann*.⁸ In this case the question did not rise directly, and the decision may be considered *obiter*. The facts in this case disclosed that there was just a general indefinite promise to marry, with no date set. So far as the contract in this case was concerned, it might have been performed within a year and thus clearly escape the operation of the statute of frauds under rules clearly defined in cases to be subsequently considered.

But in the Mann case the Supreme Court of Illinois injected a new consideration into the discussion of this question by asserting that a contract to marry is *sui generis* in at least one respect, it can be considered as being renewed from time to time by every fresh protestation of affection. The court said: "Contracts of marriage, although defined as "civil contracts," are peculiar, and it is, perhaps, not entirely accurate to say they are subject to the same strict construction as civil contracts in relation to property. As a general rule, it may be no accurate terms are used in making them, nor is it material any precise day be fixed, at the making of such contract, when it shall be fulfilled. Such matters are usually for future consideration, and really form no material part of the contract. The law implies, such contracts *in the absence of any special agreement*,⁹ shall be per-

(7) *Paris v. Strong*, 51 Ind. 389; *Lawrence v. Cooke*, 56 Me. 187, 96 Am. Dec. 443; *Clark v. Pendleton*, 20 Conn. 495; *McConahey v. Griffey*, 82 Iowa 564.

(8) 85 Ill. 222.

(9) The italics are ours. They indicate to us a vital distinction as we shall later observe. Where no special date is fixed the contract can either be considered as possible to be performed within one year or as a continuing contract, impliedly renewed from time to time, but this can hardly be said of a definite, explicit agreement to be married at a time definitely ascertained and at a date fixed beyond a period of

formed within a reasonable time. It is a relation that affects the happiness of the parties for life, and it may be years may elapse after the engagement is understood, before any day is definitely agreed upon for consummation. Such contracts, until a breach is shown that terminates them, *may be regarded as continuing contracts by consent of the parties*, and hence are, in no just sense, within the statute of frauds."

The next case of dissent is that of *Brick v. Gannar*.¹⁰ In that case the court argues the question originally, not apparently having the benefit of the argument in the Mann case, decided about seven years before. In this case A, in 1881, agreed to marry B "in the month of May, 1883." A continued his attentions until December, 1882, when he married C. The trial court had the jury make a special finding on the question: "Was there a renewal of such mutual promise or agreement between the parties within one year before the month of May, 1883?" This was answered in the affirmative, and the general verdict for plaintiff was allowed to stand and judgment rendered thereon.

The Supreme Court of New York ignored the special finding and argued generally that the statute of frauds had no application whatever to executory contracts to marry. First, because contracts to marry were not actionable at law when the statute was first passed, in 1787, and therefore "not within the mischiefs which caused the passage of the act." Second, because no such defense has ever been known in England, nor has any reported case ever considered the question, and, therefore, "the fact that no such defense was ever made or heard of is cogent evidence against it." Third, because to require such contracts to be in writing "would introduce a practice contrary to the natural usages of life." Fourth, because the peculiar title of the New York statute containing the section under consideration has reference only to

one year from the time the agreement is made, and where there is no subsequent superseding agreement, express or implied.

(10) 36 Hun (N. Y. 1885) 52.

"fraudulent conveyances and contracts relating to goods, chattels and things in action, and would therefore not include promises to marry, and that since the title of an act may be considered to limit the meaning of any particular word or words, it is clearly evident that such agreements were not intended by the New York legislature to be "included within its perview."

On the last ground stated in the opinion just referred to, the court attempts to distinguish the cases of *Derby v. Phelps*,¹¹ *Nichols v. Weaver*,¹² and *Laurence v. Cooke*,¹³ the New Hampshire statute being entitled simply "Actions;" the Kansas statute, "Frauds and Perjuries," and the Maine statute, "Prevention of Frauds and Perjuries in Contracts and Actions Founded Thereon." Of course, it was necessary for the court to absolutely ignore the decision of *Ullman v. Meyer*,¹⁴ because that case also considered the New York statute.

Another more recent case has swollen the volume of the cases endeavoring to overturn the rule announced in the earlier cases. In the case of *Lewis v. Tapman*,¹⁵ it was held, under the particular facts in that case, that a contract to marry "within three years" may possibly be performed within one year, and is, therefore, not within a provision of the statute of frauds as to "an agreement not to be performed within a year." As this rule is clearly in accord with the rule announced in the earlier cases, the further argument of the court is clearly *obiter*. In this further argument the court takes occasion to accept the position of the New York and Illinois supreme courts, and hold generally that "a contract to marry is not within the provision of the statute of frauds requiring agreements not to be performed within a year to be in writing. The argument in this case adds the further consideration that contracts to marry are not purely civil contracts, and therefore not embraced in the phrase "any agree-

ment." The court said: "The objects of a contract to marry are totally unlike the purposes to be accomplished by any other contract. The relation it has in view is wholly distinct from the relation which any other contract would contemplate. The capacity of the parties to it to enter into it is far less restricted as to age than in any other agreement. It can only be made between a man and a woman. It has its origin in the natural law, and is the foundation of society. All these considerations indicate that the statute was not designed to embrace it. Why should a contract of this nature be placed in the same category with one for the sale of goods or the performance of labor, and be made subject to the provisions of an enactment obviously intended to regulate suits on undertakings relating to the ordinary dealings in trade and commerce?"

With this presentation of the cases, we shall now offer some criticism of the cases which deny the application of the statute of frauds to contracts to marry.

Referring to the argument of the New York case of *Brick v. Gannar*,¹⁶ that such contracts are "not within the mischiefs which caused the passage of the act," we have to suggest that such an observation is manifestly superficial. As the learned New Hampshire court states in the *Phelps* case, the contracts that come within the statute of frauds are not limited to such contracts as were enforceable at the time of its adoption. The great purpose of that statute is not to hinder the enforcement of certain contracts, but to prevent perjuries, frauds, baseless inventories founded on parol agreements and attempted to be enforced at times and under circumstances which made it difficult to defend against them. Certainly, there is no class of cases where "baseless invention" is so often relied upon as in attempts of women to prove contracts of marriage in order to wring from an unwilling suitor his consent to marry them, or the payment of a large sum of money. If the statute is aimed at "perjury," its en-

(11) *Supra*.

(12) *Supra*.

(13) 56 Me. 193.

(14) *Supra*.

(15) 90 Md. 294, 45 Atl. 459, 47 L. R. A. 385.

(16) *Supra*.

forcement is clearly required in this class of cases.

The argument also advanced by the New York court that the fact that there were no cases involving this defense in England, and therefore¹⁷ no such defense was ever recognized in the jurisdiction which gave us the statute of frauds, is certainly not logical. It can be dismissed with the statement that such absence of authority may be due to the fact that no good lawyer in England ever had the temerity to raise such a question.

Nor can we agree with the argument in the Maryland case, where it is contended that there is no distinction between a promise to marry and the marriage itself, and that, therefore, the same sanctity which public policy attaches to the marriage relation attaches likewise to the contract to marry, and that, therefore, "as the contract of marriage, or the contract to marry, treating them as identical, is so essentially different from every other contract known to the law, it cannot be assumed that parliament, by the use of the words "any agreement, intended to include the contract to marry within the prohibition contained in the clause of the fourth section of the statute of frauds." As a matter of fact, there is a distinction between a contract to marry and the marriage relation itself. In a comparatively recent case by the Supreme Court of Massachusetts,¹⁸ this distinction is clearly set forth and the authorities cited. The court said: "There is no reason why executory contracts of marriage should not be treated, in reference to the fraud of either party, like any other contracts. We think it is well settled that fraud of such a kind, in its essential elements, as would invalidate an ordinary¹⁹ contract, is a good defense to an action upon a contract to marry.²⁰ But, after a contract to marry has ripened into a marriage, different considerations affect the case. On grounds of pub-

lic policy, the law seeks to make the marriage relation in every case as nearly permanent as possible without doing injustice. The difference between the relations of a man and woman affianced and their relations after marriage, is more than the difference between those who have made an ordinary executory contract and the same persons after the contract is executed." If therefore a contract to marry is the same as any other ordinary contract, such as, for instance, to enter a partnership, there is no good reason for exempting it from the fourth section of the statute of frauds.

While, however, we believe the decisions which hold a contract to marry to be wholly without the operation of the statute of frauds, to be wrong on principle, we believe much of their zeal is sincere and for a good purpose, and might be more wisely directed in recognizing that the statute is not as harsh in its operation as they have supposed.

Thus, it is clearly settled, that the statute has absolutely no application where from the terms of the agreement it does not appear that the promise was not to be performed within one year.

In the case of *Clark v. Pendleton*,²¹ a very carefully reasoned case, the parties agreed to be married generally, that is, without setting any time. Later, as defendant was on the eve of taking a journey the date was postponed until he should return, which was expected at the end of eighteen months. The court held that the agreement to marry generally was a continuous agreement, and not within the statute, as its execution could take place at any time, and that the postponement due to the voyage was not a superseding of the first agreement by a new agreement definitely fixing the time at the end of eighteen months. If the latter view was taken, the court conceded the contract would have been void because not in writing. The court said: "It is not alleged, in any form, that the agreement was to depend on the termination of a voyage which would necessarily occupy that time (one year).

(17) A clear non sequitur.

(18) *Smith v. Smith*, 171 Mass. 404.

(19) The italics are ours.

(20) *Clark v. Pendleton*, 20 Conn. 495; *McConahey v. Griffey*, 82 Iowa, 564, 48 N. W. 983.

(21) 20 Conn. 495.

It is only alleged that it was expected by the parties, that the defendant would be absent for the period of eighteen months. But this expectation, which was only an opinion, or belief of the parties, and the mental result of their private thoughts, constituted no part of the agreement itself; nor was it connected with it so as to explain or give a construction to it, although it naturally would, and probably did, form one of the motives which induced them to make the agreement. The thing thus anticipated did not enter into the contract, as one of its terms, and, according to it, as stated, the defendant, whenever he should have returned, after having embarked on the voyage, whether before or after the time during which it was thus expected to continue, would be under an obligation to perform his contract with the plaintiff. As it does not therefore appear, by its terms as stated, that it was not to be performed within a year from the time when it was made, it is not within the statute."

A. H. ROBBINS.

St. Louis.

INSURANCE—TOTAL DISABILITY.

INDUSTRIAL MUT. INDEMNITY CO. v.
HAWKINS.

Supreme Court of Arkansas, April 4, 1910.

Where a policy provided for indemnity in case insured by reason of injury should be immediately and wholly disabled and prevented from prosecuting any and every kind of business for a period of not less than a week, the word "prosecution" indicated that the parties intended that the insured in order to recover benefits, should be wholly disabled from doing that business which he had the ability to prosecute, and hence the term "disabled from prosecuting any and every kind of business" did not mean that insured, who was a day laborer and able to do only manual work, could not recover because he was not so disabled as to be prevented from performing mental activities if he had the requisite education, and he was therefore wholly disabled within the policy when he was incapacitated from performing manual labor.

FRAUENTHAL, J.: This was an action instituted upon a policy of insurance to re-

cover indemnity for the time that plaintiff was unable to prosecute any business by reason of an injury received by him. On March 4, 1907, the defendant issued its indemnity policy of insurance, whereby it agreed that if the plaintiff received an injury "which shall independently of all other causes immediately, and wholly disable and prevent the insured from the prosecution of any and every kind of business for a period of not less than one week," it would make certain weekly payments to him during the continuance of such disability. The plaintiff was a day laborer, and on September 3, 1908, when the policy was in full force, he was injured while engaged in tearing up old machinery at the shops of the St. Louis, Iron Mountain & Southern Railway Company. The testimony on the part of the plaintiff tended to prove that the injury consisted of a contusion and abrasion of the right knee, and that he was wholly incapacitated and disabled by reason thereof from work of any and every kind from the date of the injury until October 5, 1908. The testimony also tended to prove that his disability did not render him so helpless that he could not have done some other kind of business if he had been possessed of the mental capacity. The evidence showed that plaintiff was uneducated and was not capable of earning a livelihood in any other work or business except by manual labor. The sole question involved in the case for determination is whether or not under the above provision of the policy the plaintiff was injured to such an extent as to entitle him to a recovery. Upon that question the court instructed the jury that the plaintiff would be entitled to recover "if you believe from the evidence in the case that the plaintiff sustained an injury which of itself wholly disabled and prevented him from doing any and every kind of work pertaining to his occupation, or within the scope of his ability, for a period of over one week. * * * If, on the other hand, you find from the evidence that the plaintiff's injury was not such as to wholly disable and prevent him from doing any and every kind of work pertaining to his occupation within the scope of his ability for a period of over one week, your verdict will be for the defendant." And the court refused to instruct the jury at the request of defendant as follows: "The jury is instructed that, unless they find from the evidence that the injury sustained by the plaintiff was such as to wholly disable and prevent the plaintiff from the prosecution of any and every kind of business, you will find for the defendant." A verdict was returned

in favor of plaintiff, and defendant has appealed to th's court.

The right of the plaintiff to recover in this case depends upon the interpretation of the language of the contract describing the extent of the disability under which he must suffer from the injury, and what would constitute a total disability within the meaning of the policy. In the construction of all contracts the true object is to arrive at the intention of the parties; and, in order to do that, it is necessary to take into consideration the object and purpose of the parties in making the agreement. In construing such a provision as is involved in this policy, that meaning should be given to the language as will be consistent with the fair import of the words used, having reference to the object and purpose of the parties in making the contract. The contract sued on is like any other insurance policy, and its provisions should therefore be construed most strongly against the insurer. As the language employed is that of the defendant, a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one. American Bonding Co. v. Morrow, 80 Ark. 49, 96 S. W. 613, 117 Am. St. Rep. 72; Title Guaranty & Surety Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537. The general object of such a contract as is involved in this case is to furnish to the insured an indemnity for the loss of time by reason of the injury which prevents him from prosecuting business. Its evident purpose is to secure him means of living during the time that he is unable to earn a livelihood. The language employed in this provision of the policy is for the purpose of defining what will constitute a total disability to earn a livelihood. Mr. Kerr in his work on Insurance (sections 385, 386) defines a total disability within the meaning of this character of policy of indemnity insurance as follows: "Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists although the insured is able to perform occasional acts if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labor so long as was reasonably necessary to effect a speedy cure." 4 Joyce on Insurance, § 3031.

Total disability is necessarily a relative

matter, and must depend chiefly on the peculiar circumstances of each case. It must depend largely upon the occupation and employment and the capabilities of the person injured. In the case of McMahon v. Supreme Council, 54 Mo. App. 468, where a policy provided to give relief where the insured was "totally and permanently disabled from following his usual occupation," it was held that the total disability would occur where the party was prevented from following an occupation whereby he could obtain a livelihood, and that, in determining whether such a disability exists in a given case, both the mental and physical capabilities of the insured should be considered. The following cases are to the same effect: Young v. Travelers' Ins. Co., 80 Me. 244, 13 Atl. 896; Lobdill v. Laboring Men's Mutual Aid Ass'n., 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542; Turner v. Fidelity & Casualty Co., 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; Wolcott v. United Life & Accident Ins. Ass'n., 55 Hun, 98, 8 N. Y. Supp. 263.

In the case of Wall v. Continental Casualty Co., 111 Mo. App. 504, 86 S. W. 491, the policy provided "that the insured to become entitled to indemnity for loss of time" must be disabled "from doing or performing any work, labor, business, or service, or any part thereof." In that case the court held that if the insured was disabled to do such work as, considering his ordinary employment, qualifications for affairs, and station in life, could have been expected of him, he was totally disabled within the meaning of the policy and should recover. See, also, Foglesong v. Modern Brotherhood, 121 Mo. App. 548, 97 S. W. 240; Hutchinson v Knights of Maccabees, 68 Hun, 355, 22 N. Y. Supp. 801; Gordon v. Casualty Co., 54 S. W. 98. There are some cases which hold that a literal effect should be given to the language employed in such provisions of the policy, and that, where the total disability is limited to doing any and all kinds of business, the insured must be unable to perform, not only the duties of his usual occupation, but the duties of any other occupation. Maccabees v. King, 79 Ill. App. 145; Lyon v. Ry. Pass. Assur. Co., 46 Iowa, 631. But we think the provisions of contracts similar to the one involved in this case, like the provisions in all insurance policies, should be construed most favorably toward those against whom they are meant to operate; and they should be interpreted so as to carry out the plain purpose of the agreement. That construction should be given to the language which would not make it inoperative from its very inception, but which would if at all consistent with the

words employed make an effective undertaking. In the case at bar the total disability occurred when the insured was prevented by the injury "from the prosecution of any and every kind of business." The use of the word "prosecution" indicates that the parties intended to mean that the insured was wholly disabled from doing that business which he had the capabilities to prosecute. Otherwise, he could not recover unless he sustained an injury that rendered him absolutely helpless both mentally and physically. The plaintiff was an uneducated day laborer. He had no ability to do any business of any kind except that of manual work. He could not practice law or medicine or perform the duties of a banker or book-keeper. He did not have the ability to follow these lines of business; and yet he was not so totally disabled that he could not follow these avocations if he had possessed the ability to do so. It is, in effect, contended by defendant that by the terms of the contract he could theoretically, if not practically, do some kind of business, and therefore he cannot recover. Such a construction of the contract would virtually make it ineffective for any purpose at its very execution. Under such an interpretation, the insured would scarcely, if ever, be entitled to indemnity. But we are of opinion that it was the intention of the parties that the plaintiff should under some circumstances receive indemnity. For that protection he was making stated payments and the defendant received such payments. It was manifestly the intention of the parties that he should receive indemnity when he was so injured that he was wholly and totally disabled and prevented from the prosecution of any business which he was able to do or capable to engage in; and we think that this interpretation of the contract is not inconsistent with the above provision defining the nature of the disability as contemplated by the policy. We conclude that this is the reasonable and proper construction of the provision of the contract involved in this case. The lower court therefore did not err in its rulings upon the instructions in this case.

The judgment is affirmed.

NOTE.—Total Disability in Accident Insurance.
—The Influence of the Rule of Strict Construction Against Insurer.—It seems from a few of the cases we submit that it is almost impossible for an accident insurance company to so phrase its policy that a court will say that total disability will be enforced, in such way that the jury may not be allowed to apply their interpretation. These cases exhibit more a weak theory pursued by our courts than almost any other class. We

submit some cases. It seems hard to say there is any principle of construction being developed. In *Mut. Ben. Assn. v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423, there was a provision for weekly benefits while the insured was "totally disabled and confined to the house." Plaintiff became sick from pericarditis, and only left his house to visit his physician, doing the latter because of his poverty. The court said: "The words 'totally disabled,' as well as the words 'confined to the house' must receive a reasonable construction. The total disability does not mean an absolute helplessness. Plaintiff might have been able to walk—he might have been able to ride on the cars to his physician's office and still have been entirely incapacitated for work or business." It was thought also that the visits to the doctor do not prove there was no confinement to the house, as fairly meant by the policy.

The case of *U. S. Casualty Co. v. Hanson*, 20 Colo. App. 303, 79 Pac. 176, goes more fully into a discussion of authority than the Nancarrow case and held in the case of an accident to a supervising builder, who was injured physically, but still was able to give some outside attention to his business, and found it necessary to employ an experienced man in his place and devoted his time mainly to obtaining relief and looking after his correspondence, that he was not barred from recovery by a provision specifying that the injury should "independently of all other causes immediately, wholly and continuously disable him from transacting any and every kind of business."

In *Lobdill v. Mutual Aid Assn.*, 69 Minn. 14, 71 N. W. 668, 38 L. R. A. 537, 65 Am. St Rep. 542, where defendant went down about every day to see his physician, get shaved and sat around his store, and while able to perform some trivial act, such as selling an article and making change, but yet could not in proper care of his health take any substantial part in the transaction of business, this was held not to show he was not totally disabled.

In *James v. Casualty Co.*, 113 Mo. App. 622, 88 S. W. 125, plaintiff, a queensware merchant was injured so that he had to go on crutches—he went to his place daily, signed checks, approved orders for goods and dictated letters. But he could not do many of the principal matters pertaining to the business of a queensware merchant. He could not get about the store and was compelled to sit about his store in a crippled condition. He went to New York, and went to a small number of houses with which he usually dealt, and dealt with them, but he had to have someone to accompany him. A verdict finding recovery on total disability was affirmed.

This case shows, perhaps, more forcibly than any other of those we cite, that the state of the law on this subject is one of chaos. The jury are given the right to proceed unbridled.

In *Young v. Ins. Co.*, 80 Me. 244, 13 Atl. 896, it was said one is "wholly disabled from prosecuting his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor, and he was able to do and perform one only, he was as effectually disabled

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*the shoulder was injured by a fall, causing pain and
disabling him of the use of his arm. He went
to his store two or three times a week. The
court said, "As long as one is in possession
of his mental faculties, he is capable of trans-
acting some parts of his business, whatever it
may be, although he is incapable of physical ac-
tion. * * * It cannot be said as a matter of
law that the plaintiff's disability" did not wholly
disable him, etc.*

In *Blylow v. Cas. & Surety Co.*, 72 Vt. 325, 47 Atl. 1066, plaintiff's occupation was that of a lumber in a granite cutting yard and his duties were "overseeing and changing and boxing granite, loading and unloading cars." His injury restricted him to "overseeing." The court thought he was not wholly disabled.

The rationale of this case seems in none of the decisions followed, and the next case has the severe literalness which governs it.

In *Vest v. United Ben. Soc.*, 120 Ga. 411, 47 S. E. 942, the policy required that one should be "immediately, wholly and continuously disabled," etc. Plaintiff, a clerk, was struck by a framed picture dropping from the wall. He continued at his work for six days, by which time inflammation had set in and he was wholly unable to use his arm. Immediately for two hours after being struck he did not attend to business, but serious injury came after several days from blood poison, causing abscess. Immediately also he was debarred from performing part of his labor in handling the goods, but he was daily at the store, for a period of three weeks, not remaining, however, all day, and then he could go no longer. A non-suit was held proper.

The case of *Turner v. Fidelity & Cas. Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428, seems scarcely consistent with the Georgia case. In the Michigan case the business of the plaintiff was that of money lending on personal security. His injury was to his arm; he went each day to his office but had a man to do his work for him, he staying there only a short time. He could not dress himself. The court said: "We find nothing in the record which shows or tends to show that plaintiff was not totally disabled from attending to and prosecuting any and every kind of business pertaining to his occupation. At least it was a question for the jury." The court relied mainly on the Young case from Maine, *supra*. C.

CENTRAL LAW JOURNAL
JETSAM AND FLOTSAM.

TECHNICAL ERROR VS. SUBSTANTIAL JUSTICE.

Hon. Thomas H. Franklin, of San Antonio, Tex., formerly president of the Texas Bar Association, has undertaken to defend "technicality" as against "substantial justice," and his argument, which appeared recently in the San Antonio Daily Express, is at least ingenious and clever. Mr. Franklin says:

"It goes without saying that every good citizen, whether lawyer or layman, is desirous that substantial justice should be done in every case, but whether the measure to be applied is the length of the chancellor's foot, the amount of gray matter in the judge's brain, the size of the court's conscience or the forms of judicial procedure as settled by the experience of the past, and the best intelligence of the ages, is 'another question,' as Kipling would say. Unfortunately the feet of the chancellors are not of equal length, the gray matter of all judges not of like size and texture, and some consciences are cross-eyed, some atrophied and some dropsical. Justice is not very substantial when it is dependent upon the condition of the liver, or the integrity of the digestion of some average individual upon whom the ermine robe has fallen.

"A burglar once appeared before the Khedive and lodged a complaint against a houseowner because a windowsash had fallen on his arm and broken it while he was crawling through the window in a nocturnal effort to earn an honest living by stealing a few of the necessities of life. The Khedive listened politely and said, 'Send for the owner of the house.' The latter was brought by the minions of the law before the dealer in substantial justice, and, hearing the complaint, answered: 'Most worthy Khedive, I am not to blame, I did not build the house; the carpenter did.' The Khedive recognized the substantial justice in the defense and said, 'Send for the carpenter.' Again the minions of the law went forth and soon returned with the alarmed mechanic, who promptly replied to the charge: 'Most worthy Khedive, I am not to blame. It is true I built the house, but whilst I was working on the window I saw a woman in a very bright red dress crossing the street, and I turned to look at the dress, and my attention being thus attracted I failed to hang the window securely.'

"This answer was so penetrated and pervaded with the spirit of substantial justice that the Khedive directed the woman to be brought before him. Again the minions went forth and returned with the woman. To her the story was told, and she made answer: 'Why, most worthy Khedive, I am not to blame. The carpenter does not say that he found me fair and looked at me, but that he looked at my red dress. I did not dye the dress, the dyer did that.'

"In this the Khedive again saw substantial justice and said: 'Bring the dyer before me.' And another time the minions went forth and returned with the dyer, to whom the previous proceedings were stated. Now, the dyer had dyed the dress and he admitted the fact. That was enough—the Khedive had found an admitted fact and was ready to deal out substantial justice, so he adjudged that the dyer was guilty

and should be hung to his own doorframe, and the unfortunate victim of law administered without regard to technicalities was turned over to the executioner and hurried to execution. In a short time the executioner returned with the dyer unhung, and reported to the Khedive: 'Most worthy Khedive, I cannot hang this man to his own doorframe, for it is too low.'

"By that time the wise minister of substantial justice was hungry and tired—he could no longer brook the law's delays—so he yawned and wearily said: 'Oh, turn the wretch loose, and go out and find some other dyer whose doorframe is high enough to hang him.' And thus substantial justice was done.

"I have lost my bearings. I can no longer form a mental conception of what is substantial justice. I had thought that it was the result finally arrived at in a court of competent jurisdiction after hearing had in accordance with settled rules of procedure, upon competent, relevant and sufficient testimony. I, of course, recognized that all human institutions were fallible, and that under any procedure a miscarriage of justice might occur, but I believed that fewer errors would be committed if fixed rules were followed, than if judges imagined themselves judicial vicegerents divinely ordained to determine anything and everything technical error that stood in the way of their conception of the substantial justice in the controversy before them.

"Poor old technical error! Brave old technical error! You have been hit and shot and strangled, defamed, defiled, denounced, wounded, maimed, and given up for dead, but when some great right has been assailed, and a crazed multitude has clamored for its destruction, you have bravely faced the fury of the crowd and stayed the assault until reason once more resumed its sway; and then, smock and smirking substantial justice, who has been cowering and trembling in the folds of the judicial ermine while the storm was on, has once more emerged and asked for your displacement.

"But, 'the world do move,' and the wave is roaring and frothing, and perchance advancing civilization is even now framing an invitation to the Khedive to come and abide with us awhile—and give us substantial justice. If so, we should lower our door frames."

THOMAS H. FRANKLIN.

San Antonio, Tex.

INCREASE OF COURTS AND DECADENCE OF LAW.

In the early ages courts were few and simple. It was not to comply with the demand of the people that they were multiplied in kinds, but to furnish places for the king's friends, to take care of dependents, and to provide different kinds of "justice" according to the rank or influence of the subjects. England has had sixty-five (!) different kinds of courts. To master the rules of practice in these courts so as to avoid technical non-suits and snap-judgments required so much time that lawyers were divided into attorneys, advocates, counsellors, proctors, barristers and serjeants, each doing part of the work in a case. The result was that an English attorney was only a fraction of a complete lawyer. The practice was no

more logical than for one court to try the facts of a case and then turn it over to another court to decide the law.

The United States started with a comparatively simple system of courts. Then there was added the bankruptcy court which unintentionally tends to make dishonest trade honorable and to fleece the honest debtor and his creditors. Instead of settling bankruptcy matters in the county where the debtor and the creditors live, the case is often taken 200 or 300 miles off to another county and put into the hands of professional bankruptcy attorneys and trustees, and the bankrupt's assets disappear like water cast upon sand. The state courts should have full jurisdiction of insolvency. There have been created other intermediate courts that by delay rack the poor suitor and furnish the man who can afford to keep on appealing a double chance to escape. Our present Congress created the "Court of Customs" and the President urges that a "Court of Commerce" be added to the list. Besides those courts, we have several judicial commissions.

Most of our states began with about four kinds of courts which have been increased until we have the following variety: Supreme, appeals, circuit, district, chancery, common pleas, quarter sessions, county, probate, surrogate, orphans, county commissioners, superior, civil, civil court of appeals, criminal, criminal court of appeals, police, justice, and judicial commissions too numerous to mention. To make rules of practice different from each other seems to be the highest ambition of many courts, so that before a lawyer begins a case he must read over the voluminous rules of the particular court to be secure against being "quashed" for some irregularity.

It would seem logical to arrange courts in accordance with our divisions of government: a state (supreme) court, a county court (uniting civil, criminal, probate and juvenile courts in one) of general jurisdiction, and justices courts for the final governmental divisions of the country. This would keep the government close to the people so that they might "obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws" (Wis. Con., 1, 9), and at the place where they live. There should be sufficient judges in each court to try every case in each term.

CHARLES M. SCANLAN.

HUMOR OF THE LAW.

Judge—You are accused of snatching a turkey from a grocery window.

Prisoner (a student).—I took it for a lark, your Honor.

Judge—No resemblance whatever, sir. You must have been drunk. Sixty days.—Chicago Record-Herald.

Algy—"Well, I've decided one thing, anyhow. I'm not going to be either a lawyer or a preacher."

Archie—Huh! Nature decided that for you about the time you were born.—Chicago Tribune.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. Appeal and Error—Consent of Parties.—No appeal can be taken by either party from a judgment entered by consent, in view of B. & C. Comp. § 548.—Twichell v. Risley, Or., 107 Pac. 459.

2.—Order Appointing Referees.—An order appointing referees to make partition and sale of real estate held not objectionable as a delegation of judicial power to the referees.—Huneke v. Huneke, Cal., 107 Pac. 131.

3. Arbitration and Award—Sufficiency of Award.—The rule that it is essential to the validity of an award by arbitrators that it should finally determine the matters submitted is true, both under the common law and under Code Civ. Proc. §§ 1281-1290.—Boyd v. Bargagliotti, Cal., 107 Pac. 150.

4. Attachment—Validity.—A writ of attachment having been invalid a levy thereunder did not bar or prevent a new proceeding in the same action.—Kern Valley Bank v. Koehn, Cal., 107 Pac. 111.

5. Banks and Banking—Bona Fide Holder.—Where a bank pays to a bona fide holder a forged check purporting to be drawn upon it by a depositor, it cannot recover the amount paid from the innocent holder.—Pennington County Bank v. First State Bank, Minn., 125 N. W. 119.

6. Bills and Notes—Payment in Work.—Defendants being entitled under a lease to pay one of two annual rent notes in work, plaintiff by refusing to designate work could not prevent defendants from doing the work and then recover on the note in money.—Hume v. Hale, Mo., 125 S. W. 871.

7. Boundaries—Description.—A description of a block of land by metes and bounds is sub-

ordinate to the description of the block by its number according to a map, and must yield in case of conflict.—Cook v. Hensler, Wash., 107 Pac. 178.

8.—Disputed Boundaries.—Where the boundary between adjacent landowners is in dispute, the remedy is either ejectment or an action to establish the boundary.—Struntz v. Hood, Wash., 107 Pac. 352.

9. Breach of Marriage Promise—Pecuniary Condition.—In an action for breach of marriage promise, evidence as to the wealth of defendant's father is inadmissible.—Spenser v. Simmons, Mich., 125 N. W. 9.

10. Brokers—Employment and Authority.—Ordinarily a person employed by a property owner to sell the property as his agent has no authority to buy it himself alone or together with others without the owner's consent.—Mitchell v. J. A. Gifford & Co., Ga., 67 S. E. 197.

11. Carriers—Breach of Contract.—A street car passenger could not recover for his ejection because of the conductor's refusal to accept a transfer, without proof that the transfer was good.—Brown v. Brooklyn, Q. C. & S. R. Co., 121 N. Y. Supp. 445.

12.—Contract for Through Shipment.—The acceptance of goods by a carrier, marked to a point beyond the terminal of its line, creates a prima facie liability to deliver at the point of destination.—Carter v. Chicago, M. & St. P. R. Co., Iowa, 125 N. W. 94.

13.—Imputed Contributory Negligence.—The rule against imputed contributory negligence does not absolve a passenger against using ordinary care for his own safety.—Fujise v. Los Angeles Ry. Co., Cal., 107 Pac. 317.

14.—Penalties for Refusal to Receive Freight.—In an action against a carrier for penalties for failure to receive and transport an interstate shipment, plaintiff does not have to show that defendant has filed and published its schedule of freight rates as required by law, defendant being presumed to have complied with the law.—Burlington Lumber Co. v. Southern Ry. Co., N. C., 67 S. E. 167.

15. Constitutional Law—Police Power.—Legislation, which has for its object the promotion of the public health, safety, morals, convenience, and general welfare, or the prevention of fraud or immorality, is, as a general rule, valid.—People v. Wilber, N. Y., 90 N. E. 1140.

16.—Self-Executing Provisions.—Where the constitution did not provide a method for enforcing a right of action given, but expressly required the legislature to do so, a statute providing the manner of its enforcement was essential to effectuate the provision.—Burton v. Union Pacific Coal Co., Wyo., 107 Pac. 391.

17. Contempt—Improper Language in Brief.—A brief filed in the Supreme Court containing a matter disrespectful to the trial judge is a contempt of the supreme court.—First Nat. Bank v. Superior Court of Lassen County, Cal., 107 Pac. 322.

18. Contracts—Misrepresentations as to Contents.—Misrepresentations as to the contents and effect of a contract, whereby a person is induced to sign the contract without reading it, is an element of fraud.—Charleston & W. C. Ry. Co. v. Devlin, S. C., 67 S. E. 149.

19.—Rescission.—A party cannot rescind a contract either at law or in equity on the ground of fraud when after knowledge of the fraud he affirms it.—McNaught v. Equitable Life

Assur. Society of United States, 121 N. Y. Supp. 447.

20.—**When Payable.**—In contracts between individuals where the payment of interest is fixed at a percentum per annum, it is payable at the time of the maturity of the principal obligation.—*Hollywood Union High School Dist. v. Keyes*, Cal., 107 Pac. 129.

21. **Corporations—Use of Corporate Name.**—A corporation which has acquired a proprietary right in a name may have applicants for incorporation enjoined from fraudulently appropriating such name and obtaining a charter under it for a similar organization.—*Creswill v. Grand Lodge K. P. of Georgia*, Ga., 67 S. E. 188.

22. **Courts—Jurisdiction.**—Where the appellate court has no jurisdiction to determine the merits of a controversy, it has no jurisdiction to entertain an appeal from any judgment or order, whether involving the merits or not.—*Yuba County v. North American Consol. Gold Mining Co.*, Cal., 107 Pac. 138.

23.—**Stare Decisis.**—A question of law formerly decided by the supreme court is stare decisis and should remain so unless principle or authority require a different rule to be adopted.—*People v. Drosté*, Mich., 125 N. W. 87.

24. **Criminal Law—Articles Wrongfully Taken from Accused.**—An alleged forged note is admissible in evidence in a prosecution for forgery, though it was obtained from defendant's desk in his absence by witness taking the desk apart, without a warrant to search for and seize it.—*People v. Campbell*, Mich., 125 N. W. 42.

25. **Criminal Trial—Admissions.**—Accusation of crime calls for a reply even from a person under arrest, where the circumstances indicate that he was free to reply if he chose to do so.—*People v. Swaile*, Cal., 107 Pac. 134.

26.—**Instructions.**—A charge that acts and statements of a conspirator made after the conspiracy ended are presumed in law to be true if made against interest held erroneous as on the weight of the evidence.—*Ausmus v. People*, Colo., 107 Pac. 204.

27.—**Judicial Notice.**—Judicial cognizance does not extend to municipal ordinances.—*McAllister v. State*, Ga., 67 S. E. 221.

28.—**Statement by Court.**—Where a court commits error by expressing an opinion as to what a witness had testified to which is directly opposed to the fact, the error is not cured by his withdrawing his statement from the jury, without admitting that he was wrong as to his remembrance of what the witness had testified to.—*People v. Jacobs*, Ill., 90 N. E. 1092.

29. **Damages—Destruction of Crops.**—The measure of damages for the destruction of crops not matured is the value of the probable yield under proper cultivation when matured and ready for market, less the estimated expense of producing, harvesting, and marketing.—*Malmstrom v. People's Drain Ditch Co.*, Nev., 107 Pac. 98.

30.—**Medical Expenses.**—Where plaintiff alleges that he has expended sums for medical services, he may recover only such sums as he has paid, but if he alleges only that he has incurred a liability he may show the amount thereof.—*Gibbs v. Poplar Bluff Light & Power Co.*, Mo., 125 S. W. 840.

31. **Deeds—Delivery.**—Possession of a deed from husband to wife by the wife did not constitute a delivery where none was intended by

the husband.—*Clark v. Clark*, Or., 107 Pac. 23.

32.—**Delivery.**—A deed of voluntary settlement may be effective to vest title in the grantee, though it is retained by the grantor in his possession until his death, where other circumstances do not show an intention contrary to that expressed on the face of the deed.—*Riegel v. Riegel*, Ill., 90 N. E. 1108.

33.—**Presumptions.**—Presumption when the provisions of a deed are susceptible of two interpretations, one of which recognizes a legal obligation and the other savors of fraud, held to be in favor of the legal obligation.—*Bell v. Gardner & Lacey Lumber Co.*, S. C., 67 S. E. 151.

34.—**Undue Influence.**—The burden is upon one occupying a confidential or fiduciary relation to another to show that the execution of a deed from such other was fair, free from fraud or undue influence, and that the grantor was mentally competent.—*Payne v. Payne*, Cal., 107 Pac. 148.

35. **Descent and Distribution—Proof of Heirship.**—That two men called each other brother, that each spoke to the other by his first name, and that their conversation and conduct indicated relationship, and was consistent with the fact that they were brothers, sufficed to establish the fact of such relationship.—*In re Hartman's Estate*, Cal., 107 Pac. 105.

36. **Dismissal and Non-suit—Affirmative Relief.**—Complainant was not entitled to dismiss a suit to quiet title without prejudice after defendants had asserted their rights in the property and asked affirmative relief.—*Curry v. Wilson*, Wash., 107 Pac. 367.

37. **Divorce—Cruelty.**—Under the statute, unfounded charges by a husband against the wife of unchastity and a disavowal of the authorship of his children, made in the presence of the children, constitutes cruelty justifying a divorce.—*Morris v. Morris*, Wash., 107 Pac. 186.

38.—**Division of Property.**—Property of parties to a divorce action not mentioned in the pleadings is not within the court's jurisdiction, and no decree can be rendered affecting it.—*Carpenter v. Brackett*, Wash., 107 Pac. 859.

39.—**Interlocutory.**—An interlocutory order for alimony pendente lite will not be enforced by execution except where special statutory provision warrants it.—*Kapp v. Seventh Judicial Dist. Court*, Nev., 107 Pac. 95.

40. **Dower—Nature.**—The rights of devisees under the will must yield to the rights of the widow under the statute to have her dower assigned.—*Mettler v. Warner*, Ill., 90 N. E. 1099.

41. **Electricity—Negligence.**—Evidence that an electric lamp was in a city street and that the shade fell on plaintiff, without any proof as to the cause of its falling, raises a presumption of the owner's negligence.—*Gibbs v. Poplar Bluff Light & Power Co.*, Mo., 125 S. W. 840.

42. **Embezzlement—Nature of Offense.**—Larceny after trust differs from other forms of larceny, in that trespass is not an essential element of the offense.—*Smith v. State*, Ga., 67 S. E. 202.

43. **Eminent Domain—Compensation.**—One merely owning the fee of a private street held not substantially damaged by the taking of the land for a public street.—*In re Carroll St. in City of New York*, 121 N. Y. Supp. 435.

44.—**Public and Private Use.**—Proceedings

for taking property for both public and private use are wholly invalid only when the public and private use is so commingled that they cannot be separated.—*City of Tacoma v. Nisqually Power Co.*, Wash., 107 Pac. 199.

45. **Equity—Forfeiture.**—Equity will not lend its aid to enforce but in a proper case will often relieve against a forfeiture.—*Farmers' Pawnee Canal Co. v. Pawnee Water Storage Co.*, Colo., 107 Pac. 286.

46.—**Pleading.**—Where defendant instead of answering the bill, lets it be taken as confessed, he is precluded from introducing evidence to controvert the truth of any of the allegations therein.—*St. Louis Hoop & Stave Co. v. Danforth*, Mich., 125 N. W. 5.

47. **Escrow—Unauthorized Delivery.**—Where a bank received a deposit under an escrow agreement, and delivered it to a person not entitled to receive it, the bank is liable therefor.—*Brown v. Citizens' State Bank*, Idaho, 107 Pac. 405.

48. **Evidence—Presumption as to Receipt of Letters.**—Letters addressed and mailed held presumed to have been received by the addressee.—*Baker v. Temple*, Mich., 125 N. W. 63.

49. **Executors and Administrators—Appointment.**—After a will is probated, letters testamentary will relate back to the date of the testator's death and validate acts done by the executor in line of his duty before he qualified.—*Mettler v. Warner*, Ill., 90 N. E. 1099.

50.—**Bona Fide Purchaser.**—A purchaser of land at a sale for distribution of a decedent's estate takes as successor in interest of heirs of the decedent's estate, and subject to the interest of another heir who was not brought into the proceedings for distribution, though the interest of such heir is not of record.—*Horton v. Barto*, Wash., 107 Pac. 191.

51.—**Wills.**—Where an executor offering a putative will for probate is met with a contest, he may cast the burden on those who are to be benefited by the probate or may assume it himself, and, if he assumes it, he cannot bind the estate by any contract for expenditures.—*Dodd v. Anderson*, N. Y., 90 N. E. 1137.

52. **Fire Insurance—Construction of Policy.**—The rule that it must be presumed that persons are familiar with the contract to which they are parties, and, in the absence of fraud, are bound by the provisions therein, should not be strictly applied to insurance policies.—*Raulet v. Northwestern Nat. Ins. Co. of Milwaukee*, Cal., 107 Pac. 292.

53. **Fixtures—Mining Machinery.**—Where, under a lease of mining lands with option to purchase, the lessee places machinery on the land, the machinery is chattel and can be sold and mortgaged by the lessee.—*Powell v. Plank*, Mo., 125 S. W. 836.

54. **Forcible Entry and Detainer—Right of Owner.**—The lawful owner of real property entitled to the possession cannot recover possession by violence from one in actual and peaceable possession.—*Anderson v. Carlson*, Neb., 125 N. W. 157.

55. **Forgery—Presumptions.**—In a prosecution for the forgery of a note, the same presumptions as in a civil action that the date on the instrument is the date of its execution should be indulged.—*People v. Campbell*, Mich., 125 N. W. 42.

56. **Frauds, Statute of—Contracts to be Per-**

formed Within Year.—An oral agreement, made in August, 1907, to extend for one year a subsisting written lease, which expired September 1, 1907, is not within the statute of frauds.—*Roeks v. Booth*, Mich., 125 N. W. 69.

57. **Homestead—Forced Sale of Son's Share.**—Where an adult son's share in a homestead, the title to which descended to his mother and her children, is sold on execution, the purchaser is entitled to partition when all the minor children have arrived at majority.—*First Nat. Bank v. Carter*, Kan., 107 Pac. 234.

58.—**Right of Surviving Spouse.**—The homestead statute, being a statute of descent, is subject to legislative control, and may be changed or abolished at will, as the right of descent is a mere expectancy, and not a vested right.—*Hannon v. Southern Pac. R. Co.*, Cal., 107 Pac. 335.

59. **Homicide—Corpus Delicti.**—The corpus delicti must be proven in homicide cases beyond a reasonable doubt, either by direct or circumstantial evidence.—*Ausmus v. People*, Colo., 107 Pac. 204.

60. **Husband and Wife—Alimony.**—Where it appears that a husband is able to comply with the order of court for the payment of alimony, and willfully refuses to do so, or has, in fraud of the rights of his wife, and in violation of the order of court, rendered himself unable to do so, he may be punished as for contempt.—*Messervy v. Messervy*, S. C., 67 S. E. 130.

61.—**Community Property.**—Where land is community property of husband and wife, the fact that the title stands in the wife's name does not prevent the husband from maintaining an action for injuries thereto in his own name.—*Malmstrom v. People's Drain Ditch Co.*, Nev., 107 Pac. 98.

62.—**Injury to Wife.**—In an action by a husband for loss of services of his wife, due to an injury, he could not recover for the wife's physical or mental suffering.—*Cincinnati, L & A St. R. Co. v. Cook*, Ind., 90 N. E. 1052.

63. **Indictment and Information—Election Between Counts.**—Where the same offense is charged in different counts of the indictment, or where the several offenses charged in separate counts grow out of the same transaction, the state should not be required to elect.—*State v. Jones*, S. C., 67 S. E. 160.

64. **Injunction—Local Option.**—Holder of liquor license has no vested right and that prosecutions may be waged against him will not invade any property right nor authorize injunction.—*Nims v. Gilmore*, Idaho, 107 Pac. 79.

65. **Innkeepers—Loss of Guests' Property.**—An innkeeper is not bound to receive the goods of a person who desires the use of the inn only as a place of deposit.—*Oxford Hotel Co. v. Lind*, Colo., 107 Pac. 222.

66. **Intoxicating Liquors—Right to Sell.**—No person has a vested right under the Constitution to sell intoxicating liquor, and the legislature, under the police power, may regulate or prohibit such sale.—*Gillesby v. Board of Com'r's of Canyon County*, Idaho, 107 Pac. 71.

67.—**Unlawful Sale.**—Under an ordinance making it a misdemeanor for any person to sell or give away spirituous liquors, one sale is sufficient to constitute the offense.—*Ex parte Bond*, Cal., 107 Pac. 148.

68. **Judgment—Assault and Battery.**—In an action for injuries occasioned by an unlawful assault in which several persons participated,

and plaintiff proceeded against all in the same action, his failure to connect any one or more with the wrongful act held not to impair his right to recover against the others.—*Rand v. Butte Electric Ry. Co.*, Mont., 107 Pac. 87.

69.—Evidence of Indebtedness.—A dormant judgment is not enforceable, but until barred by limitations it is evidence of indebtedness.—*Johnson v. Huggins*, Ga., 67 S. E. 217.

70.—Res Judicata.—Judgment in former action held res judicata where all the parties to the instant case were proper parties to the first case, and the questions raised could have been determined in such first case.—*City of El Reno v. Cleveland-Trinidad Paving Co.*, Ok., 107 Pac. 163.

71. **Landlord and Tenant—Breach of Lease.**—In an action by a tenant against a landlord for breach of an alleged oral agreement to extend the lease, evidence was admissible to show the profits of the tenant's business before and after he was compelled to move, on the measure of his damages.—*Rooks v. Booth*, Mich., 125 N. W. 69.

72.—Counter Claim.—Defendants held entitled to counterclaim damages for fraudulent dispossessory in an action by the landlord on notes given for rent.—*Hume v. Hale*, Mo., 125 S. W. 871.

73.—Leases.—Where a lease does not provide that the landlord shall repair, a subsequent agreement for repairs is without consideration.—*Eisert v. Adelson*, 121 N. Y. Supp. 446.

74.—Unlawful Detainer.—In forcible entry and detainer, where the notice to quit was sufficient, a tender of the rent due before the commencement of the action was of no effect.—*Newman v. Worthen*, Wash., 107 Pac. 188.

75. **Liability Insurance—Cost and Expenses of Suit.**—Even if costs of suit are not embraced in the indemnity clause of a policy insuring an employer against liability for injuries, insurer being liable to pay the expense of a doctor for an injured employee in any event and having notice of the doctor's action against insured, it is bound by the judgment against insured for his services, and is legally bound to pay it, with the expenses insured was put to in defending the action.—*Hudson River Telephone Co. v. Aetna Life Ins. Co.*, N. Y., 121 N. Y. Supp. 565.

76. **Marriage—Annulment.**—Where a man lawfully arrested for seduction on a warrant based on probable cause marries prosecutrix to procure his discharge, he cannot annul the marriage on the ground of duress.—*Thorne v. Farrar*, Wash., 107 Pac. 347.

77. **Master and Servant—Assumed Risk.**—A servant held not to assume the risk of injury caused by the negligent performance of a duty by the master.—*Anderson v. Globe Nav. Co.*, Wash., 107 Pac. 376.

78.—Fellow Servant.—A tormerman in charge of the semaphore and interlocker at the crossing of two railroads held a fellow servant of an engineer of one of the railroads.—*Stever v. Ann Arbor R. Co.*, Mich., 125 N. W. 47.

79.—Injury to Servant.—Under Const. art. 9, sec. 36, abolishing the fellow servant rule, held that a servant injured through the negligence of a fellow servant may sue both the master and fellow servant.—*Coalgate Co. v. Bross*, Ok., 107 Pac. 425.

80.—Injury to Servant.—On the issue as to the cause of a fly back from a ripsaw, evidence

as to the cause of the other fly backs on the same saw during the same month held admissible.—*Van Doorn v. Heap*, Mich., 125 N. W. 11.

81.—Liability to Third Person.—As between a general master and a temporary employer, the party liable for injuries by a servant is the one who at the time had control of the servant's conduct.—*Alaimo v. E. & J. Marrin Co.*, N. Y., 121 N. Y. Supp. 563.

82.—Obvious Risk.—A minor servant, employed in a sawmill, assumed the obvious risks of the service, and the employer was not bound to change the arrangement of the machinery.—*Scanlan v. George G. Page Box Co.*, Mass., 90 N. E. 1146.

83.—Tramroad.—While a tramroad for logging need not be constructed as well as a commercial railroad, more care is required to guard against injuries to workmen due to defects therein.—*Campbell v. Hoosier Stave & Lumber Co.*, Mo., 125 S. W. 845.

84. **Mechanics' Lien—Personal Liability.**—Where a lessor did not personally contract for any improvements made upon leased premises by the lessee, he was not personally liable therefor, though he had, by his conduct, estopped himself from asserting the exemption of his interest in the premises from liens for labor and materials furnished in making the repairs.—*Shaw v. Spencer*, Wash., 107 Pac. 383.

85. **Municipal Corporations—Billboards.**—An ordinance prohibiting the construction of billboards and advertising structures within ten feet of any building or structure or street or alley line held unreasonable and void.—*Curran Bill Posting & Distributing Co. v. City of Denver*, Colo., 107 Pac. 261.

86.—Invalid Contract.—A suit to enjoin the carrying into effect of an invalid contract by an improvement district may be brought in the name of one or more of the taxable inhabitants of the district for themselves and all others similarly situated.—*City of El Reno v. Cleveland-Trinidad Paving Co.*, Ok., 107 Pac. 163.

87.—Use of Streets.—The maintenance of a mill flume in a public street so as to prevent access thereto by an abutting owner held a nuisance, which could be abated by injunction.—*Hague v. Juab County Mill & Elevator Co.*, Utah, 107 Pac. 249.

88. **Negligence—Care as to Licensee.**—The occupant of a store owes one whom he induces to enter therein on an implied invitation the duty of reasonable care to keep the premises in safe condition.—*William Laurie Co. v. McCullough*, Ind., 90 N. E. 1014.

89.—Customary Methods.—While negligent acts do not cease to be negligent by repetition, proof of a customary method of doing an act by those who are frequently and habitually required to do it is some evidence as to whether the method is negligent.—*Campbell v. Chicago, R. I. & P. Ry. Co.*, Ill., 90 N. E. 1106.

90.—Discovered Peril.—Negligence of station agent will not excuse the negligence of a train crew in running him down after his dangerous position was apparent.—*Hallock v. New York, O. & W. Ry. Co.*, N. Y., 90 N. E. 1124.

91.—Imputed Negligence.—Neither a passenger on a public conveyance nor one on a hack hired from a public stand on the street for a drive are responsible for the driver's negligence, if they exercise no control over him further than to indicate the route, or the places to which they wish to go.—*Fujise v. Los Angeles Ry. Co.*, Cal., 107 Pac. 317.

92.—Imputed Negligence.—Where plaintiff was riding upon an express wagon by the driver's invitation, the latter's negligence in operating the wagon could not be imputed to plaintiff.—*Ingalls v. Lexington & B. St. Ry. Co.*, Mass., 90 N. E. 1154.

93. **Officers—Exemptions.**—The exemption of public officers from responsibility for the negligence of their subordinates in the discharge of their public duties, held to arise from consideration of public policy.—*Barker v. Chicago, P. & St. L. Ry. Co.*, Ill., 90 N. E. 1057.

94. **Pleadings—Necessity to Deny Defenses.**—It cannot be claimed that matters of defense set out in the answer are admitted where the same matter alleged in connection with other facts in a special defense is denied.—*Rand v. Butte Electric Ry. Co.*, Mont., 107 Pac. 87.

for taking property for both use are wholly invalid or private use is so comm be separated.—City v. Power Co., Wash., 107 Pac.

45. **Equity—Forfe**

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"Hub". Transfer of property is consigned and delivered to a railroad company and accepted for shipment, the railroad company becomes for that purpose the agent of the consignee.—Cary v. Williams, Colo., 107 Pac. 219.

103. **Warranties**.—An express warranty as to quality precludes an implied warranty, even though it relates to a different quality.—John Turi's Sons v. Williams Engineering & Contracting Co., 121 N. Y. Supp. 478.

104. **Specific Performance—Defenses**.—Where one contracting to convey real estate was not the owner and could not perform, the purchaser had no right to specific performance.—Morrisey v. Strom, Wash., 107 Pac. 191.

105. **Street Railroads—Driving Team**.—One is not necessarily negligent in driving near a railroad because he knows his team is liable to be frightened at the cars.—Cincinnati, L & A. St. R. Co. v. Cook, Ind., 90 N. E. 1052.

106. **Negligent Starting of Car**.—The starting of a street car with a sudden jerk when the operatives do not, and have no reason to know that a passenger is about to alight is insufficient to establish a cause of action for injuries to the passenger.—Ely v. Southwest Missouri R. Co., Mo., 125 S. W. 833.

107. **Subrogation—Mortgage**.—Where one who has an interest in property, but who is not primarily responsible for the payment of the mortgage debt thereon, pays it, he is entitled to an assignment of the mortgage or to be subrogated to the rights of the mortgagee.—Thomas v. Home Mut. Bldg. Loan Ass'n, Ill., 90 N. E. 1081.

108. **Taxation—Assessment**.—Where separate lots in a block are contiguous and are owned by a single individual, they may be properly assessed as one parcel.—Houghton v. Kern Valley Bank, Cal., 107 Pac. 113.

109. **Tax Deed**.—A tax deed held not invalid because failing to state the date upon which subsequent taxes were paid.—Gibson v. Garst, Kan., 107 Pac. 40.

110. **Tax Deed**.—Tax deeds conveying non-contiguous tracts of land, sold en masse for a gross sum, are void, even though the county be the purchaser.—Page v. Gillett, Colo., 107 Pac. 290.

111. **Tax Sale**.—Tax sale "at the door of

"held a sale "at the courthouse."

Scott, S. D., 125 N. W. 124.

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Title.—The surreptitious obtaining of recognition by a tax deed claimant as not to start limitations running in favor of the tax deed.—Laffitte v. City of Superior, Wis., 125 N. W. 105.

112. **Tax Titles**.—Where land owned by A, and standing in his name in the registry of deeds, is assessed to B, as the owner, and is sold for taxes and purchased by C, and afterwards the land is assessed as the land of C, and sold for taxes and purchased by D, the latter obtains a good title.—Welsh v. Briggs, Mass., 90 N. E. 1146.

113. **Telegraphs and Telephones—Delay in Delivery**.—An action for delay in delivery of a telegram, the place where the negligence occurred held not material for the purpose of fixing the law determining plaintiff's rights.—Brown v. Western Union Telegraph Co., S. C., 87 S. E. 146.

114. **Tenancy in Common—Consent of Co-Tenant**.—Consent of one of two remaindermen, on the termination of the preceding life estate, that a mortgaged should retain possession until the mortgage was paid held a complete defense to an action by the remaindermen jointly to recover possession prior to such payment.—Barson v. Mulligan, N. Y., 90 N. E. 1127.

115. **Torts—Obligation of Trustee**.—A corporation accepting a conveyance of land in trust to sell for the best price obtainable held liable to the grantor for the difference between what the property was actually sold for and what the corporation could have obtained for it.—Gay v. Young Men's Consol. Co-Op. Mercantile Inst., Utah, 107 Pac. 237.

116. **Proof by Parol Evidence**.—An express trust cannot be proved by parol.—Kinney v. McCall, Wash., 107 Pac. 285.

117. **Vendor and Purchaser—Consideration**.—A person who with notice purchases property from one who purchased for a nominal or grossly inadequate consideration is not a bona fide purchaser.—Kinney v. McCall, Wash., 107 Pac. 285.

118. **Sale of Vendee's Interest**.—Where a vendor refused to declare a forfeiture for the vendee's default in installments, the purchasers from the vendee could require performance on compliance or tender of compliance with the contract terms.—Baldwin v. Siddons, Ind., 90 N. E. 1055.

119. **Waters and Water Courses—Percolating Waters**.—The common law rule as to a land-owner's rights to percolating waters has been modified in California by the doctrine of sic utere tuo —Miller v. Bay Cities Water Co., Cal., 107 Pac. 115.

120. **Wills—Election of Widow**.—Where a widow elects to take under the law, such election will not render the will inoperative, but, as between other persons, it will be enforced as nearly as possible.—Pittman v. Pittman, Kan., 107 Pac. 235.

121. **Insane Delusion**.—Misrepresentation of facts by testator or unreasonable or extravagant conclusions drawn therefrom do not establish an insane delusion sufficient to invalidate his will.—Snell v. Weldon, Ill., 90 N. E. 1061.

122. **Probate**.—The failure of a subscribing witness to state that he wrote testator's name at his request can only be raised in probate proceedings, or within one year thereafter, as provided by section 6110 (section 2385).—Horton v. Barton, Wash., 107 Pac. 191.

123. **Work and Labor—Acceptance of Services of Attorney**.—A client accepting the benefits of an action prosecuted by an attorney held to consent under Clv. Code, sec. 1589, to the obligations arising therefrom so far as the facts were known, or ought to have been known by him.—Batcheller v. Whittier, Cal., 107 Pac. 141.

124. **Quantum Meruit**.—One contracting for the construction of a bridge held not entitled to defeat a recovery on quantum meruit by proving that he received no benefit from the labor performed because of the destruction of the bridge by a flood.—Boyd v. Bargagliotti, Cal., 107 Pac. 156.

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ST. LOUIS, MO., JUNE 17, 1910

DIVERSITY OF BUSINESS IN A CORPORATE CHARTER.

The bankruptcy statute, in restricting its operation to corporations engaged "principally" in certain pursuits, gives rise both to questions of interpretation of state policy in allowing a business corporation to be chartered for diverse purposes and the wisdom thereof.

More directly does this suggestion come from the decision in the case of *In re Humphrey Advertising Co.*, 177 Fed. 187, decided by the Circuit Court of Appeals, Seventh Circuit. The selection or naming of the pursuits in which a corporation is to be principally engaged, so as to bring it within the scope of the bankruptcy statute, may be regarded as arbitrary, but, nevertheless, the statute proceeds upon the very natural assumption that every corporation is organized for one main or principal purpose, and whatever power is given outside of that is incidental.

The Humphrey Advertising Company was endowed with a charter specifying as follows: "Publishing, distributing and placing advertising matter in railroad cars * * * * and the allowing and placing and operating vending machines and other self-acting mechanical devices."

The court appeared to regard the business of "publishing" as one business and the doing of the other things as another, and that it was principally engaged in the other things which did not make it subject to involuntary bankruptcy.

We do not think this a fair construction of the charter, because the word "publishing" has, from its association, a restricted

meaning, and though it may be true, as the court states, that Illinois statutes allow corporations to be created for more than one corporate object, a charter should be very specific to accomplish this.

But the meaning of this particular charter is here but casually referred to, as our purpose is not to discuss this decision, but what it suggests.

Ordinary statutes for the creation of corporations divide them into classes. For example, there are those not for private gain and those for that purpose. In the former no shares of stock are issued, while interest in the latter is only thus possessed.

Then there are corporations which are purely private, and those affected by a public interest. The one sort are subdivided, in classification, and different liabilities may attach to the ownership of stock in some than in others. This is exemplified by reference to stock held in a bank, and that in a manufacturing or mercantile company.

Stock corporations are also subdivided, and their subjection to regulation and their rights of eminent domain may present many reasons why the mingling of objects in one charter might be contrary to public policy.

This would be especially true should quasi-public corporations embrace in their charter objects of a purely private nature, thus creating confusion in the exercise of their rights and the performance of their duties, and putting them under temptation to pervert public benefits to the advancement of private gain.

Less seriously perhaps, would be the result of mingling objects of a private nature, but wholly heterogeneous. Nevertheless classification of these things implies that they should be kept separate. To give a banking institution the right to carry on a mercantile business would certainly tend to make abortive regulations for the security of its depositors. And to allow an insurance company to go into manufacture, with its perils of loss, would endanger the stability of any reserve required to be kept and

make its distribution, in receivership, attended with uncertainty.

Coming down the line, let us suppose the uniting of several business objects under one charter, for example the carrying on of so many kinds of business as to create, not possibly a monopoly, but a serious hindrance to that free competition necessary for the substantial prosperity of a community.

Business corporations of the most essentially private character are those engaged in mercantile and manufacturing pursuits. One is necessary to the other and, in general aspect, it is better they should be separate. The laws of trade, local conditions and supply and demand may place them in some sort of opposition, each struggling for a fairer field and more unrestricted opportunity. Out of the friction there is generated the zeal of individual effort that advances the general good.

Corporations are formed by the aggregation of capital beyond either the ability of individual accumulation or the willingness of hazard in its employment. But this aggregation should have its limit short of the combining of such multitude of things under one control as may make enterprise top-heavy towards widespread disaster or dominant over the free spirit of competition.

This is a fair subject for state policy, and it is quite conceivable that states might have definite views in limiting the powers of their creatures, because of the fact that they are but the representatives of people in combination. Especially may this be so when these people, as individuals, may not have as citizens any local interest in communities where these creatures operate. Merely a financial interest in a state is no great security for its welfare.

However, there are all sorts of classification and there is regulation pertaining to each class. This shows they are treated under the law separately and the presumption is that it is better they should separately pursue the even tenor of their various ways.

NOTES OF IMPORTANT DECISIONS

TREATIES — THEIR INTER-RELATION THROUGH HIGHLY FAVORED NATION CLAUSES.—*In re Ghio's Estate*, 108 Pac. 516, decided by Supreme Court of California, recites the names of twenty-three countries, treaties with which and this country contain most highly favored nation clauses. In this case the Consul General of the Kingdom of Italy for California, Nevada, Washington and Alaska Territory claimed, by virtue of such a clause, an alleged right under a provision in a treaty between the United States and the Argentine Republic concluded in July, 1853.

The treaty with Italy was made in 1878, and those with the other countries were from as early as 1826 down to 1902. The opinion of the court says, in effect, that as occasion might arise the question could be raised as well by the consul of any one of these countries as by the Consul General of Italy.

We see, therefore, that the favored nation clause may survey our international horizon eastwardly for a' most a century and westwardly to the setting of our national sun. Our whole treaty system is claimed to be interlocked, so to speak, by the favored nation clause, enabling foreign countries to spy into the privileges granted by us to any country and claim them for their own, no matter whether accorded for special reasons or not.

Certain privileges may have been granted to particular countries for valuable consideration personal to the high contracting parties. Or, as granted to a particular country, a different interpretation might be given to language of a concession than otherwise.

This last observation is well illustrated in the case we are considering. The court conceded the right of Italy's Consul General to invoke any pertinent clause of the Argentine treaty, but restricted its effect to that which was presumably given to language by two republics, having similar systems of governments. And this was an important element in construction.

Thus it was claimed that the right given by the Argentine treaty carried into the treaty with Italy, gave its Consul General preference over a public administrator as to the estate of intestate, who at the time of his death was a citizen of Italy. The California court fortified its view, that the United States did not intend to interfere with local administration of the estates of decedents, by arguing that such a Government as the Argentine Republic did not wish to interfere with an autonomy it also cherished.

It is also to be seen from the opinion, that civil and common law terms were placed in opposition and opposition in the endeavor to ascertain what was meant by the treaty words. All of this goes to show, that an omnibus provision like a highly favored nation clause ought to have some restrictiveness about it.

When this country was a weak nation and might have been, for temporary reasons, willing to concede to another what it would not care to concede generally, when it has grown to be powerful, its diplomacy should not forever be fettered. And especially does it seem that highly favored nation clauses should not be of such customary usage as to make their omission from treaties carry a sinister inference. A treaty should contain that which, and only that which, the parties have clearly in mind at the time it is made, and it should not create a search warrant for other benefits. Within the four corners of each treaty should be found all that is contracted for.

WAIVER—MOTION FOR NEW TRIAL RE-ESTABLISHED WHERE MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO WAS WRONGFULLY SUSTAINED.—After holding that the circuit court erred in sustaining a motion by defendant for judgment in its favor notwithstanding a verdict in plaintiff's favor the First Circuit Court of Appeals goes on to say: "But this does not finally dispose of the case. Prior to the judgment for defendant, the defendant had filed one or more draft bills of exception. It also seasonably filed a motion for new trial. A waiver of the latter was made by the defendant, stating that this was in view of the ruling of the court on the defendant's motion for a judgment in its favor. Under the circumstances, justice requires that this waiver should be discharged, and that the bills of exceptions should receive the consideration of the Circuit Court and its action thereon, without being prejudiced by the subsequent occurrences."

The case was therefore remanded to the Circuit Court "with full leave to proceed in any manner not inconsistent with our opinion." Viscount de Valle Costa v. Southern Pac. Co., 176 Fed. 843.

The rule with many courts is that motion for judgment non obstante cannot be made by defendant, but his remedy is by motion in arrest. See Floyd v. Colo. F. & I. Co., 10 Colo. App. 54, 50 Pac. 564; Chicago City R. Co. v. White, 110 Ill. App. 23; Barnes v. Rodgers, 54 S. C. 115, 31 S. E. 885; Stoddard v. Insurance Co., 75 Vt. 253, 54 Atl. 284; but it may be taken for a motion in arrest, if sufficient reason

is alleged for arrest. How v. Thomas, 70 Vt. 580.

It has been ruled also, that motion for arrest precludes the making of motion for new trial afterwards. State v. Webb, 53 Kan. 464; Jones v. Foles, 4 Mass. 245; Gerling v. Ins. Co., 39 W. Va. 689.

These rules seem quite rigid, and it seems to us, that defendant should have pressed its motion for new trial to a ruling and have taken a cross-appeal. As it is, a jurisdiction giving, we may say, a larger benefit to defendant by motion for judgment, instead of a motion for arrest, should not have allowed him to thus speculate on the correctness of the ruling of the trial court. We take it, that the effect of a judgment in defendant's favor non obstante could be pleaded as res judicata while the ruling on motion in arrest could not.

CORPORATION—NOTICE TO CREDITOR OF MISAPPROPRIATION OF CORPORATE FUNDS WHERE CHECK IS USED TO PAY OFFICER'S DEBT.—The Supreme Court of New York has lately held, that where the check of a corporation payable to the order of a bank, signed by the corporation's treasurer, is used by its president to pay his debt, the circumstance is so suspicious as to put the bank upon inquiry whether corporate funds are being misappropriated. Lanning v. Trust Co. of America, 122 N. Y. Supp. 485.

This question is somewhat different from that considered by us in our annotation to a decision by the same department in Appellate Division of this court in 70 Cent. L. J. p. 174. There the question was of a corporate officer drawing checks to his own order and depositing same in another bank to his personal account. These checks were held to be notice to the bank crediting same to the officer's personal account that the officer was using corporate funds for his individual benefit.

In the Lanning case the court says: "Does the fact that it (the check) was not signed by (the president) but by another officer, under the facts and circumstances here presented, take the case out of the general rule? I think not. The defendant knew, because it was so informed when it agreed to make the loan to Twining, that the capital stock of the Monmouth Company was \$100,000, and it had little or no surplus. The amount of the check, the payee named in it, and the fact that it was being used to pay the personal debt of the president of the corporation was notice to the Trust company, in the absence of any other evidence bearing on the subject of an unauthorized use of the funds. It was payable directly to the Trust Company, and

therefore showed upon its face that Twining had no title or interest in the moneys which it represented."

It is perceived here that the court was cautious and went no further than the necessities of the case before it required, but we think that it could safely have enunciated the principle that such a check was so irregular in its mingling of an officer's personal account with corporate business that such a recipient as the Trust Company would be put upon fullest inquiry.

REMITTITUR IN VERDICTS, WHERE EXCESS IS NOT EXACTLY CALCULABLE.

Introductory.—The tendency of American courts to brush away whatever of obstruction to the end of litigation, there may be, or may be conceived to be, in the way of technicality, or in the principle of the court responding to questions of law and the jury to questions of fact, has its most pronounced exemplification in the employment of what may be called optional remittitur. Remittitur of excess in verdicts that is exactly calculable needs scarcely to be noticed, because no pretense of invasion of the province of the jury could be urged for its non-exercise. The discarding of that from a verdict, which in legal view has never come to the apprehension of the triors of fact, through the lens of evidence, is but to lop-off excrescence from substance. The only illogical step taken by any court (and there seems such sometimes) is to fail to direct it to be lopped-off, if clearly separable, instead of requiring a remittitur nisi. But that it can be taken off in one or the other way, seems practically undisputed, and for this reason we confine our attention to excessive verdicts, for whatever reason they are thus, when the excess is not demonstrably certain.

Subdividing the Subject.—The principle, that a court may deem a verdict excessive, when once admitted, carries the right to regard the source of the excess and its extent. These sources may be: (1) The admission of irrelevant or incompetent evi-

dence; (2) Error in instructions; (3) Over-estimate by the jury, and (4) Improper motive enhancing the amount. These sources or influences, insofar as they contribute to what the court adjudges to be an excessive verdict, to a degree not accurately determinable, I will take up hereinafter in their order.

Invasion of Province of Jury.—The courts which recognize remittitur nisi in the several classes of cases I am considering, deny, that the practice is a substitution of the court's judgment upon questions of fact for that of the jury. In *Arkansas Cattle Co. v. Mann*,¹ Justice Harlan says: "It cannot be disputed that the court is within the limit of its authority when it sets aside the verdict of the jury and grants a new trial where the damages are palpably or outrageously excessive. * * * The authority of the court to determine whether the damages are excessive implies authority to determine when they are not of that character. To indicate, before passing upon the motion for a new trial, its opinion that the damages are excessive, and to require a plaintiff to submit to a new trial, unless, by remitting a part of the verdict, he removes that objection, certainly does not deprive the defendant of any right, or give *him* any cause for complaint. Notwithstanding such remission, it is still open to him to show, in the court which tried the case, that the plaintiff was not entitled to a verdict in any sum, and to insist, either in that court or in the appellate court, that such errors of law were committed as entitled him to a new trial of the whole case."

In *Kennon v. Gilmer*,² it was said by Justice Gray, the appeal being from the supreme court of a territory, that: "Under these (territorial) statutes, as at common law, the court, upon the hearing of a motion for new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain

(1) 130 U. S. 69.

(2) 131 U. S. 22.

part of the verdict, and that, if he does remit, judgment be entered for the rest. * * * But in a case in which damages for a tort are assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury." The case was, therefore, remanded with direction "either to deny or to grant a new trial generally or to order judgment for a sum less than the amount of the verdict, conditional upon a remittitur by the plaintiff."

The Kennon case cites the Mann case and enforces the distinction it recognizes, to-wit: that there is no substitution of the court's judgment for that of the jury, except as to him who consents and as to him who has nothing to complain of.

A recent case from Wisconsin³ defends with elaborateness and vigor the proposition, that conditioned remittitur is no invasion of the province of the jury in any case of excessive damages, where the excess is no more than an estimate. The opinion, however, does not go as far as what is said in the above cases implies. It does not agree that "it is quite clear that if a trial or appellate court compels a defendant to submit, at the plaintiff's option, to a judgment for less than that named in a verdict, held to be fatally excessive * * * and fails to guard against all reasonable danger of impairment of the former's rights" it does not invade the rights of defendant.

The Wisconsin court deduces a rule as "the only one pursuable, consistent with the principle that the right of jury trial should not be judicially invaded" as follows: The rule "that requires the sum imposed upon the defendant, whether he consents or not, at the option of the plaintiff, to be as small as an unprejudiced jury would probably name; and the sum to be

imposed upon the plaintiff, whether he consents or not, giving the option to the defendant, to be as large as an unprejudiced jury on the evidence would probably name."

A concrete application, working both ways, of this rule is found in the same volume in which the Heinlich case is reported.⁴ In the Rueping case the decision was upon a second appeal and in two trials grossly excessive verdicts had been rendered, but the trial judge did not require a remittitur and the practice seemed to be, in that state, that the higher court merely affirms or reverses such requirement. Counsel for both parties requested the supreme court to condition the grant of a new trial. Thereupon the court ordered that if counsel for defendant consented in writing within twenty days to a judgment for \$5,000, new trial should be denied. If he failed to do this, plaintiff might within thirty days consent to a judgment for \$2,500 and avoid a new trial. Other cases are cited hereinafter, which either tacitly assume or expressly assert, that there is no invasion of the right to jury trial.

In a Georgia case⁵ the opposing theory is followed as settled law which has passed beyond the domain of discussion, but the doctrine of what is only exactly calculable being deducted does not forbid a still further reduction by consent of the plaintiff. Thus where interest was instructed for erroneously, a higher, than the non-contract, rate was allowed to be deducted, where there was no means of knowing which had been allowed by the jury.⁶

Excess Attributable to Improper Evidence.—In Wisconsin the opinion in Baxter v. R. Co.,⁷ proceeding upon the theory that it was established law in that jurisdiction that from excessiveness arising out of passion or prejudice remittitur could be re-

(4) Ruepping v. Chicago, etc., R. Co., 123 Id. 319, 101 N. W. 710.

(5) Seaboard A. L. R. Co. v. Randolph, 129 Ga. 796, 59 S. E. 1110.

(6) Seaboard A. L. R. Co. v. Bishop, 132 Ga. 71, 63 S. E. 1103.

(7) 104 Wis. 307, 80 N. W. 644.

quired nisi says: "There is no good reason to restrict the practice to exclude any case, whether on contract or sounding in tort, where plaintiff is clearly entitled to recover and a sum can be named, which in all reasonable probability will not exceed the amount which a jury will ultimately give him. If the court can name that sum, where the verdict is the result of passion and prejudice so as not to furnish any guide whatever, it certainly can in most cases where the only defect is that an element has been included improperly." In the case a remittitur from \$11,500 to \$7,000, because of "the error of permitting irrelevant evidence which tended to show a greater degree of disregard for the safety of defendant's employees than it was guilty of, thereby prejudicing the jury against the defendant." There was no claim the verdict was generally excessive, and, thus, there was as pure speculation in making the reduction as could well be imagined. The court said: "In this we do not determine what will adequately compensate plaintiff for his injuries. We simply determine what amount of the \$11,500 was probably assessed by the jury for plaintiff's actual injuries, keeping in mind the probable departure by the jury from the legal standard of compensation by reason of prejudicial, irrelevant evidence, and making a proper reduction for that." We venture to say, that verification of such a probability is wholly impossible in any questioning of any jury that ever sat in a case. The principle was applied in a very recent case,⁸ and the *rationale* of it is better perceived—that is to say, its appositeness is more apparent. In Amann v. Traction Co.⁹ it was held that the evidence in a personal injury case as to future damages should have been excluded as incompetent and the supreme court affirming judgment for balance after remittitur said: "Whether the remittitur required by the trial court would cure errors of this character on a question of actual

damages or not, we are satisfied that any jury to whom the evidence in the case might be submitted would assess damages equal to the amount of the judgment. The case was a proper one for the assessment of exemplary damages and in view of that fact we think the judgment should be affirmed."

I cannot say I commend this character of reasoning. It seems about like saying, that the extent of the error will not be inquired into, as on general principles the defendant was rather lucky than otherwise.

Excess Arising Out of Instructions.—It is scarcely needed to cite authority upon this, but as an illustration from a state which is opposed to the principle of remittitur except where the excess is exactly calculable, see Seaboard A. L. R. Co. v. Randolph, *supra*.

Excess in Honest Overestimate.—In Stephenson v. R. Co.¹⁰ the opinion is brief, the court above requiring a remittitur nisi solely upon its view that the damages suffered were only \$2,000 instead of \$3,641.66. In Alabama the same latitude of judicial discretion appears to be recognized, and while the court is not under any duty to say more than that a verdict should not stand as rendered because of excessiveness, it should rule whether or not an offer to remit a stated sum should avoid a new trial.¹¹ In Hall v. R. Co.,¹² the principle of remittitur in tort seems so strongly recognized, that terms may even be imposed on defendant because of reduction allowed. Thus, while it was held that the trial court could not require that defendant should, upon plaintiff's entering the remittitur, and for the benefit of a reduced judgment being rendered, be made to surrender his right to appeal, the court said: "We do not doubt that Judge Prince (the trial judge) might have provided in the order that the defendant should do anything necessary to preserve the right

(8) Skow v. Green Bay, etc., R. Co. (Wis.) 123 N. W. 138.

(9) 243 Ill. 268, 90 N. E. 678.

(10) 103 Me. 57, 68 Atl. 453.

(11) Richardson v. Cotton Co., 116 Ala. 381, 22 So. 478; Montgomery Traction Co. v. Knabe, 48 So. 501.

(12) 81 S. C. 522, 62 S. E. 848.

of the plaintiff as a condition of new trial, such, for example, as securing the reduced amount, if it should stand."

The logic of this is not very apparent, especially as the court says, what is patently true, that: "When, in the exercise of his judgment, the circuit judge makes an order that a new trial be granted unless the plaintiff remits so many dollars from the verdict that is an adjudication that the verdict is by that amount clearly excessive, and that the defendant is of legal right entitled to be relieved from the excess or have a new trial."

A very recent decision by the Supreme Court of Missouri¹³ shows that that tribunal, believed that the verdict was grossly excessive, yet could be affirmed conditionally on remittitur upon the theory that the amount was not swelled by passion and prejudice. The verdict was for \$75,000 actual, and \$75,000 punitive, damages in a libel case, and plaintiff was given the option to remit two-thirds of each class of damages, so that the total damage would stand at \$50,000.

The majority opinion reviews Missouri and other decisions to the effect that excessive verdicts not so by reason of prejudice or passion may be cured by remittitur, and, considering that it was found by the court that no attempt was made to justify the publication of the libel, this case must be taken as squarely ruling, that a verdict swelled by passion or prejudice, in a case where liability is undisputed, is not curable by remittitur. The serious question in the mind of the majority appears to have been whether or not, though there was no question as to liability, remittitur was proper, and holding, that the verdict was not believed to be perverted as to amount, remittitur was allowed. The opinion cites several cases wherein it was stated the great excess did not manifest passion and prejudice, but I do not think they well support the court. For example there is cited the Mann case, *supra*. There the verdict was

in a suit for conversion of cattle, and it was reduced from \$39,000 to \$22,000, and Justice Harlan, answering the contention that either the jury were "governed by passion or had deliberately disregarded the facts that made for defendant," reasoned that either amount could have been predicated upon some honest view of evidence as to value of the cattle converted. In other words the court's view and that of the jury could have been the result of calculation on values. A further case relied on was Baxter v. Cedar Rapids,¹⁴ where the verdict in a personal injury case was reduced from \$5,750 to \$3,000. The court merely observed that: "Juries may, and frequently do, err in estimating the amount of a recovery, when there is no ground for claiming that they were influenced by prejudice or passion."

When May Verdict be Taken to Show Passion or Prejudice?—The conclusion of the court in the Cook case, in a kind of trial peculiarly liable to an influence foreign to a consideration of a cause upon its merits, that a verdict for \$150,000, excessive by \$100,000, does not of itself show the probable presence of passion and prejudice, makes one wonder what sort of excess in any kind of case should presume their presence. This court does admit that verdicts on their face in personal injury cases may manifest prejudice or passion,¹⁵ and for that reason forbid remittitur. In such class of cases a verdict three times too large has been held to indicate passion and prejudice.¹⁶ A Kansas court¹⁷ held, that a verdict in a slander case of \$4,000, where the trial court thought \$500 was enough, should have been considered to show passion and prejudice.

Remittitur in Passion and Prejudice Cases.—There are statements in cases that, where passion and prejudice affect the re-

(14) 103 Iowa, 599, 72 N. W. 790.

(15) Chitty v. Railroad, 148 Mo. 64, 49 S. W. 868; Pantello v. Railroad, 217 Mo. 645, 117 S. W. 1138; Chilanda v. Railroad, 213 Mo. 244.

(16) Railroad v. Cummings, 20 Ill. App. 333.

(17) Steinbuchel v. Wright, 43 Kan. 607, 23 Pac. 560.

sult, this vitiates the entire verdict and the Cook case must be considered as authority, that this rule applies as well to cases where there is no dispute as to liability as when there is. There are cases, however, that hold that improper influence, whether of one character or another, which merely pertains to damages and not to liability, leaves the verdict remediable by remittitur. Indeed it would seem that a verdict whose amount is merely swelled by passion or prejudice is a fairer mark for remittitur in the curing or error, than one merely thought to be excessive by a court, when a jury honestly believed otherwise. In the former case there is, in no proper sense, any interference with the rightful judgment of the jury on a question of fact; in the latter case there is. And it seems to me some courts thus regard the matter.

The cases allowing remittitur in passion and prejudice verdicts concede freely that, if there is a substantial controversy as to liability, remittitur is not permissible. Thus in a Minnesota case¹⁸ it was said there was "a fair probability that the jury were influenced by the same passion and prejudice in determining other issues, that induced them to give excessive damages." Therefore a new trial was ordered. A prior decision in that state appeared to consider it necessary to remittitur, that the amount should be the result of passion and prejudice, or the jury's province would be invaded,¹⁹ but this is a departure from former ruling on the opposite theory.²⁰

In Montana,²¹ the rule is stated to be that, where it is apparent that passion and prejudice have entered into the decision, a new trial should be granted, unless it is also apparent the verdict is otherwise correct than in amount and the ends of justice

(18) Ewing v. Stickney, 107 Minn. 217, 119 N. W. 802.

(19) Goss v. Goss, 102 Minn. 346, 113 N. W. 690.

(20) Plaunt v. Transfer Co., 90 Minn. 499, 97 N. W. 433.

(21) Garwood v. Corbett, 38 Mont. 364, 99 Pac. 958; Helena, etc., R. Co. v. Lynch, 25 Mont. 497, 65 Pac. 919; Lewis v. Railroad, 36 Mont. 207, 92 Pac. 469.

will be fully served by requiring the successful party to remit the excess.

In a Tennessee case²² it was ruled that excessiveness arising out of passion, prejudice or caprice, may be cured by remittitur where the only question is as to damages and no dispute as to liability.

In Texas²³ the contention that excessiveness arising out of passion and prejudice required a verdict to be set aside notwithstanding remittitur was said to have force only where the evidence is conflicting upon the issue of liability. In Wisconsin²⁴ it was held that the rule as to passion and prejudice admitting remittitur "is only applicable in cases where it is clear that the perverse conditions mentioned only affected the amount of recovery. If it appears that the elements of passion and prejudice may have entered into, and probably did affect the decision of other questions in the case, the court's duty is to grant a new trial absolutely." Here it is seen the general rule is for remittitur and exceptions are stated to exist. In other states the converse form of statement is adopted, but there is definite agreement on the principle, that if the improper influence only relates to amount, remittitur is proper.

Summary.—As stated in 59 Cent. L. J. 454, in annotation, the tendency is in favor of remittitur in unliquidated damage cases as well as in those where the excess is exactly ascertainable, but no court has seemed to state the precise justification for the practice so well as the Wisconsin court. Illogically, too, it seems to us, have all the courts, which admit remittitur in such cases, proceeded when they deny it in passion and prejudice cases, where there is no question as to liability. We can conceive of a court allowing remittitur in that class of cases and denying same where excess is the result of a jury's honest judgment, but to say one improper element, which does not belong in a verdict, on any legal theory, cannot have the surgery of decision applied

(22) Railroad v. Roberts, 113 Tenn. 488.

(23) Railroad v. Wallis, 104 S. W. 418.

(24) McNamara v. McNamara, 108 Wis. 613, 84 N. W. 901.

to it as well as another is beyond our understanding. Had the Missouri Supreme Court proceeded on the theory that however the excess arose in the Cook case, where liability was clear, it ought to be eliminated, it would have given a rule of some use. As it is there must exist sympathy with the minority view in that case, that now, in that state passion and prejudice can never be asserted of any verdict, because the damages it contains are outrageously enormous, and vitiate the verdict on its very face.

N. C. COLLIER.

St. Louis, Mo.

TELEGRAPH—CONFLICT OF LAWS.

WESTERN UNION TELEGRAPH CO. v.
FUEL.

Supreme Court of Alabama, Feb. 10, 1910.

A contract for the transmission and delivery of a message is, as to its nature, obligation, and validity, governed by the law of the place of performance.

The facts and pleadings sufficiently appear from the opinion. The court, at the request of the defendant, gave the following charge: "(6) Gentlemen of the jury, I charge you that plaintiff is not entitled to recover any damages in this case for mental worry or mental suffering, during his trip from Barton to Tullahoma, on account of the fact that he did not get to look on the face of his dead wife, or to make preparations for her burial." The court gave this charge, with the following oral explanation: "Gentlemen of the jury, I charge you, if you find for the plaintiff, he is entitled to recover for his mental suffering, if you find that he did so suffer, on account of the fact that he did not get to look on the face of his dead wife, or to make preparations for her burial after his arrival at Tullahoma." The following charge was refused to the defendant: "(11) If the jury believe from the evidence that the wires of the defendant were interfered with by parties between Memphis and Barton, on the morning of October 26, 1907, so that the message sued on could not be transmitted from Memphis to Barton, and that the parties so

interfering with the wires were not charged by the defendant with any duties in the transmission of said message, then I charge you that the defendant is not responsible for the action of said person interfering with the wires, even though such person so interfering with the wires were the agents of the defendant."

McCLELLAN, J.: The action is by the sender, acting through an agent, for the breach of a contract to transmit and deliver, with due diligence and care, a telegram announcing the death of plaintiff's (appellee's) wife. The complaint in two counts, alleges the substance of the contract and its breach. The demurrs, objecting that averment of negligence, or willful or wanton disregard of plaintiff's rights in the premises, was omitted, were not well taken. The proper averment of the contractual status created by the parties and its breach, in this class of cases, as in all others for a breach, meets all the requirements of good pleading. Had the action been ex delicto (Krichbaum's Case, 132 Ala. 535, 31 South. 607), the point suggested by the demurrs would have been well taken. The damages claimed are for mental anguish, viz., that suffered in consequence of not being able to see the face of his wife, after death and before burial, and that inflicted on account of the deprivation of opportunity of making disposition of the remains of his wife as he desired, and of attending her burial, and of making the preparation therefor. Mental anguish was, if suffered, a proper element of recoverable damages in this case. Krichbaum's Case, 132 Ala. 535, 31 South. 607; Wilson's case, 93 Ala. 32, 9 South. 414, 30 Am. St. Rep. 23, and Menker's case, 145 Ala. 418, 424, 41 South. 850, among others. The position of this court on the question of recoverability of damages, in telegraph cases, for mental anguish suffered, is too deeply grounded to now allow investigation with a view to change.

Aside from general traverse of the allegations of each count, it was undertaken to be specially pleaded by original pleas 2 and 3, by way of confession and avoidance, that the appliances for transmitting the message from Memphis, Tenn., to Barton, Ala., that being the usual routing for messages from Tullahoma, Tenn., the initial office, were interfered with, and prompt transmission and delivery prevented, by unknown parties. Among other grounds, the demurrs to these pleas took the objections that the averments of interference were conclusions of the pleader, and did not show the facts constituting the interference. The court sustained the de-

murders. The stated objection taken to both pleas was well taken, and the action of the court must be approved on that score, independent of any other grounds of the demurrers. The pleas did not show that the cause or causes of the "interference"—the acts working it—were unknown to the defendant, if, indeed, that could avail. It was averred that the persons causing the interference were unknown; but this did not negative the other fact. Furthermore, the pleas did not negative, as they should, the fact that there was no other means, within duty, whereby the message might, with promptness, have been transmitted to Barton, Ala. Plea 3 as amended was identical with original plea 3, except it was averred that the agent at Tullahoma did not know of the "interference" at the time the message was filed with him for transmission and delivery. The amendment wrought no change in the plea from that present in the original. The general obligation and duty of such companies is set down in *W. U. T. Co. v. Emerson*, 49 South. 820, as taken from Joyce's excellent work on the law of Electricity.

The contract, in this instance, was for the transmission and delivery, with due diligence, of the message filed with the company, from Tullahoma, Tenn., to Barton, Ala. In *Sou. Ex. Co. v. Gibbs*, 155 Ala. 303, 46 South. 465, 18 L. R. A. (N. S.) 874, the subject matter of the contract was goods to be transported from another, into this state. It was there held that the plea of performance was in Alabama, and that the law of the place of performance should govern as to the nature, obligation and validity thereof. The principle must be the same here. The only practical difference is that in the one case goods were to be transported and delivered, and in the other intelligence. While, from necessity, the measure of care and diligence and assurance is not the same, of course, yet the contracts were the same in respect of performance, viz., both found inception in another state, but neither could be performed elsewhere than in Alabama. Reference to 2 Joyce, sec. 908, and notes thereto, will show that there is a difference of opinion in other jurisdictions, on the question. However, this court's attitude, as taken in the decision cited, is regarded as sound, and to renounce its application to this case would necessarily overturn the principle announced and applied in that case. *W. U. T. Co. v. Hill*, 50 South. 248.

The charges wherein the defendant sought to have the jury instructed that plaintiff could not recover for mental pain or anguish suffered in consequence of the deprivations

before stated as claimed in the complaint, were properly refused. Crumpton's case, 138 Ala. 632, 36 South. 517; Ayers' case, 131 Ala. 391, 31 South. 78, 90 Am. St. Rep. 92; 5 May. Dig. p. 902, subd. 25, noting other authorities. The relationship of the plaintiff to the deceased was that of husband.

There was testimony tending to support the averments of the complaint, and, if credited by the jury, to have entitled the plaintiff to nominal damages. The affirmative charge was, on this score alone, well refused. Besides this, under our decisions, it was also open to the jury, on the evidence, to award damages for mental anguish for the breach of the contract declared on. Authorities supra.

The explanation, it was not a qualification, of charge 6, given for defendant, was not improper. *Callaway v. Gay*, 143 Ala. 524, 529, 39 South. 277, following *Eiland's case*, 52 Ala. 322. The explanation was, as appears, merely an effort to forestall the possibility that the jury might take the charge as forbidding a recovery within the legal limits and as claimed in the complaint. Nothing was taken from the charge, as written, by the language of the court.

Charge 11 was well refused, because it limited the interference hypothesized to "the morning of October 26, 1907," whereas the interference might have ceased during the remainder of that day, and, if so, the defendant could not justify delay subsequent to the removal of the interference.

The verdict was for \$1,000. It is insisted that the amount is excessive. The court below held to the contrary. We are not convinced that the ruling was erroneous. In *Seed's case*, 115 Ala. 670, 22 South. 474, the compensation for mental anguish was held to be a matter within the impartial determination of the jury, and the finding of \$1,500 was sustained.

The assignments argued in argument do not rest on error below.

Affirmed.

Note—The Law of the Place Governing an Interstate Telegram.—There seems a very decided conflict in the cases upon the proposition above alluded to, ruled by the principal case. A case strongly supporting the principal case is that of *Tel Co. v. Lacer (Ky.)*, 93 S. W. 34, 5 L. R. A. (N. S.) 751. The opinion distinguishes the contract to deliver a telegram from one to ship property from one state to another, as to which it had been held in Kentucky that the shipper or consignee has a right to sue where the breach occurs, with the law of that place to apply. In the Lacer case the negligent act by which the sendee's name was altered, occurred in Indiana. The

opinion says: "But, argues appellant, the performance in this case was in course of execution in Indiana, where it was breached, i. e., when appellant negligently altered the address so as to cause it to miscarry. The thing contracted for in this case was not to carry property, but to do a service. The service which was contracted for was to expeditiously deliver the correct message to the addressee at the point addressed. * * * Transcribing it into characters of the Morse code, or otherwise temporarily rendering it unintelligible to ordinary persons, would not affect the contract or any rights of the parties, so long as it was finally and in due time communicated to the person intended. * * * It was a single undertaking, the performance of which was to take place in Kentucky. The delivery of the message, the communication of the intelligence to the person named, was the thing to be done. The failure to deliver could not occur till he failed to deliver it at the place and within the time contracted for." See also North Packing Co. v. Tel. Co., 70 Ill. App. 275.

The theory of there being "a single undertaking," which brought the Kentucky court to its conclusion, operated precisely the other way on the mind of the Supreme Court of South Carolina. Thus in the case of Brown v. Tel. Co., 67 S. E. 146, there is cited the case of Balderston v. Tel. Co., 79 S. C. 160, 60 S. E. 435, as supporting the conclusion that the law of the sending place governs, and quoting from the latter case it is said: "The undertaking is whole, single and susceptible of becoming fixed only in the final act contemplated. * * * It cannot be denied that such a doctrine is a just and reasonable one. The plaintiff cannot be expected to determine the point on defendant's line where the failure of duty occurred, nor do we think it consonant with public policy to permit the defendant to show that the message was delayed at some specific point on its line and thus make plaintiff's right to recover depend upon the laws of that place."

These two cases, therefore, are in agreement in barring out intermediate states. But the South Carolina case goes upon the theory: "That the law of a state where a contract is made and is to be performed in whole or in part governs as to its nature, validity and interpretation." In other words, there is a contract for services at the sending place and at the place of delivery, and services at both places are contemplated to be given for a remuneration, and diligence is to be exercised at one place as well as the other. This view recognizes distance as a factor in the contract, while the principal case and its congeners seem not to. The place of the fault, that results in miscarriage of performance, appears to be the view in Tel. Co. v. See, 126 S. W. 78, decided by Supreme Court of Arkansas. Thus a telegram was sent from Kansas by way of Kansas City, Mo., to Fort Smith, Ark. The opinion says: "The undisputed evidence shows that the negligence occurred in the State of Missouri or of Kansas. * * * In either event, the negligence did not occur in the State of Arkansas." As "in neither of those states are damages recoverable for mental anguish," the suit was dismissed. The error consisted in mistake of name of sendee. For other

cases by same court see Tel. Co. v. Crenshaw, 125 S. W. 420; Tel. Co. v. Griffin, 122 id. 489.

Between the three types of cases represented by the cases above are others, where statutes affect the question. Thus in Graf v. Tel. Co., 108 Tenn. 39, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706, a Tennessee statute was held to be a sufficient basis for recovery for mental anguish for neglect to promptly deliver a telegram sent from a state not allowing such, sender as well as addressee being a proper party plaintiff. The court, upon an extensive review of the authorities as one of general principle agreed, that, if suit were upon the contract the action would not lie, but the statute of the place of delivery had a right to impose a penalty for non-delivery, or for non-prompt delivery, and as it gave specifically a right of action to any party aggrieved, the only question remaining was if the sender in the foreign state could be deemed such.

The Arkansas case above referred to does not appear expressly to refer to a state statute on this subject, which provides that telegraph companies shall be liable for mental anguish in receiving, transmitting and delivering messages, but most probably it is to be so understood, as generally mental anguish may not be recoverable where unaccompanied by physical injury. If so, the case above reported would seem to be correct on the theory advanced in the Tennessee case. See, however, Peay v. Tel. Co., 64 Ark. 538, 43 S. W. 965, 39 L. R. A. 538, decided prior to such statute, which on general law rejected the rule in the principal case.

Reed v. Tel. Co., 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609, is much relied on in other states for the rule that the sending place determines the governing law. The opinion thought an agreement to transmit and deliver a telegram was "like a contract of affreightment," with "its validity and interpretation ordinarily to be governed by the law of the state in which it was made. Both parties to this agreement for the transmission of the message resided in Iowa. The tariff was paid and defendant entered upon the performance of the contract in that state."

This looks very clear to us. The very thing that was in Iowa was transported to Missouri. Its form was changed in the former state by the wand of civilization and the old form restored in Missouri—or, at least, interpreted for practical use. Following this case are Bryan v. Tel. Co., 133 N. C. 603, 45 S. E. 938; Hancock v. Tel. Co., 137 N. C. 497, 49 S. E. 952, 60 L. R. A. 403. In Tel. Co. v. Waller, 96 Tex. 589, 07 Am. St. Rep. 936, 74 S. W. 751, the case of Tel. Co. v. Cooper, 29 Tex. Civ. App. 591, 69 S. W. 427 is approved, and that bases itself on the Reed case, *supra*.

In 2 Whart. Conf. of Law, 1082 and 1083, application of the rule in contracts of affreightment is said to include telegram so as to permit recovery of damages for mental anguish, if the law of the sending state is thus, though it be otherwise in the state to which the telegram is sent. There are not many cases cited by the author, but it seems to us that, if all that can be said to the contrary is said by the Kentucky case, *supra*, the opposing cases have little to rest upon.

We may concede possibly the correctness of the Tennessee and Arkansas cases as resting on statutes and that they are not given any extraterritorial force, but the Missouri case and its followers, having equally as practical application, also are preferred as bringing to bear on the contract the only law that the primary parties are presumed to know. C.

JETSAM AND FLOTSAM.

THE DEMISE OF THE CROWN.

(The following excerpt is from 74 London Justice of the Peace, 230, the bordering of all the columns of May 14th, 1910 number being in deep black. The avoidance of interregnum and discontinuance of legal processes and indictments at common law is set forth very clearly and also the past acts of parliament have played in this regard.)

Le Roi est mort! Vive le Roi! As one emerged into the Strand on Monday morning, and noticed the flag above the Law Courts floating again at the masthead for a brief spell while George the Fifth might be declared King, one realized the truth of the old saying that "the King never dies." Edward indeed is dead; but George is King, and must be proclaimed as such; and, in theory at least, the proclamation of a king is a glad event. If we turn to the pages of Blackstone, we find the legal principle clearly set forth: "A third attribute of the King's Majesty," he says, "is his perpetuity. The law ascribes to him, in his political capacity, an absolute immortality. The King never dies. Henry, Edward, or George may die, but the King survives them all; for immediately upon the decease of the reigning prince in his natural capacity his kingship or imperial dignity by act of law, without any interregnum or interval, is vested at once in his heir, who is, *eo instanti*, King to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his demise—*demissio regis vel coronae*, an expression which signifies merely a transfer of property, for, as is observed in Plowden, when we say 'the demise of the Crown,' we mean only that, in consequence of the disunion of the King's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus, too, when Edward IV., in the tenth year of his reign, was driven from the throne for a few months by the House of Lancaster, this temporary transfer of his dignity was denominated 'his demise,' and all process was held to be discontinued as upon a natural death of the King."

At common law, as will be seen from the concluding words of our quotation from Blackstone, a demise of the Crown had the effect of discontinuing legal processes and indictments. Moreover, it dissolved Parliament and vacated all offices held under the Crown—an inconvenient, not to say dangerous state of affairs, which has now been remedied by statute. So far as Parliament is concerned, the existing provisions are to be found in section 51 of the Representation of the People Act, 1867, and section 3 of

the Meeting of Parliament, 1797, by the former of which the duration of an existing Parliament is no longer to be affected by the death of the Sovereign, whilst by the latter, if the last Parliament has been dissolved and the day appointed for the assembling of a new one has not arrived, the last Parliament is revived for six months, unless sooner prorogued or dissolved by the successor to the Crown. Finally, by the succession to the Crown Act, 1707, upon the death of the Sovereign Parliament, if separated by adjournment or prorogation, must at once meet, convene, and sit. By the last-mentioned Act, also, the various public seals in use for the time being are to continue and be made use of as the respective seals of the successor until he gives orders to the contrary.

The combined effect of 4 W. & M. c. 18, s. 6, and 1 Anne c. 2, s. 4, is that all writs and pleas generally in the various courts, including indictments or informations for any offense or misdemeanor, continue and remain in full force and effect upon the demise of the Crown, and may be proceeded upon in their ordinary course. At the date of the death of Queen Victoria the general rule was that officers of the Crown held office for six months after the demise, unless sooner removed or superseded—see as to the Privy Council the succession to the Crown Act, 1707, as to Judicial Commissions 1 Anne c. 2, s. 5, and as to other "offices, places, and employments, civil or military," the same statute of 1707. Whilst such was the state of the law it was considered necessary for the new Sovereign to issue a Proclamation "requiring all persons being in office of authority or government at the decease of the late Queen," to proceed in the performance and execution of all duties belonging to their respective offices, whilst they should hold the same respectively during the King's pleasure (see 65 J. P. 58). In 1901, however, was passed the Demise of the Crown Act, by which "the holding of any office under the Crown, whether within or without His Majesty's dominions, shall not be affected, nor shall any fresh appointment thereto be rendered necessary, by the demise of the Crown." Probably, therefore, on the present occasion no similar proclamation will be made.

A LAWYER'S TEN COMMANDMENTS.

Duties to Client:

1. Be loyal to the interests of the client whose cause you have championed and in his cause be guided by high moral principle. Do not let the amount of your fee determine the amount of your industry.

2. Neither underestimate nor overrate the value of your advice and services in your client's behalf.

Duties to Court:

3. Be honest with, and respectful to, the court.

4. Do not depend on bluff or trick or pull to win a case, but depend on thorough preparation.

Duties to Public:

5. Give a measure of your best legal service to such public affairs as may best serve your community. Remember also to protect the defenseless and oppressed.

6. Never seek an unjustifiable delay. Neither

render any service nor give any advice involving disloyalty to the law.

Duties to Fellow Attorneys:

7. Be friendly with, and keep faith with the fellow-members of the bar; publish their good characteristics rather than their shortcomings. Especially be on friendly terms with the young man starting in the legal profession and if necessary, inconvenience yourself in order to encourage him.

8. Do not discuss your cases with the court in the absence of opposing counsel.

Duties to Self:

9. Avoid the "easy come," "easy go" method with your finances. Bank no fee until paid.

10. Keep up regular habits of systematic study of the law. Acquire special knowledge in some one of its branches. Remember, the law is a jealous master.

JAMES M. OGDEN.

Indianapolis, Ind.

GROSSCUP AND HIS CRITICS.

The Chicago Inter-Ocean, in alluding to the attacks which have recently been made upon Judge Grosscup, says that "it is difficult to see how the charges can be wholly ignored by the judge. There is an old saying that a judge should be, like Caesar's wife 'above suspicion.' Not having any special knowledge of the matters here referred to, and therefore, assuming that the Hon. Peter S. Grosscup is a worthy judge, the Inter-Ocean is compelled to admit that in the expressed opinion of many reputable lawyers, the Hon. Peter S. Grosscup does not measure up to the ideal judicial standard. We know not whether there is any such precedent for such course, but looking at the situation as it is and noting the way in which the air is filled with these tales, we would suggest that he should consider whether he should longer sit silent under these accusations—whether he should not come boldly forward to meet and put them down by demanding that investigation of his life and official conduct which is admitted to be a possible outcome of the steps already taken in Washington. The judge will have all the advantage in such a trial."

The attitude of reputable newspapers evidences a reasonable demand on the part of the people that neither Congress, the profession nor Judge Grosscup can afford to ignore.

The Central Law Journal intends to use what influence it has to clear the profession from the necessity of being put constantly on the defensive by occupants of the bench, who by their actions may tend to bring discredit on the bench and the administration of the law.

A few lawyers have undertaken the defense of Judge Grosscup. We see no incentive for such efforts in behalf of a judge who will not defend himself. Let Judge Grosscup take up each of the serious charges made against him, some by his own clerk on affidavit, and explain them, and if the explanation is satisfactory on its face, the profession will undoubtedly be willing to throw the burden of proving the charges on those that make them.

So far as we are concerned we have none but the most friendly feeling for Judge Grosscup. Our interest in this controversy is wholly impersonal. We are jealous of the good name of the profession and of the integrity of the bench.

THE BIBLE WE KISS IN OUR COURTS

Up into our court house walking,
Saw I judge and lawyers talking—
Thought they'd talk and talk and talk
For evermore.

Heard the lawyers in commotion
Shout of commonwealth's devotion
To the care of all its subjects,
More and more.

But instead of consolation
I was filled with consternation
At what happened in that court-room
O'er and o'er.

Saw I witness, lecherous devil,
Known by men in sin to revel,
Coming forth to testify; saw
This and more.

Saw the clerk with bible lifted,—
To his lips for kiss 'twas shifted,—
Vile and impious wretch! Saw this and
Thought it o'er

Thought I saw my sainted mother
As she knelt once with another
In my cherished days of youth, those
Days of yore.

Saw her read those sacred pages,—
God's own Word,—sent for all ages,
Saw her read and read and live it
O'er and o'er.

What would she think if she knew it?
If in court-room she could view it?—
Sacrilegious lips should touch it,
Nevermore!

Microscopic lenses seeking
Also show its covers reeking
With tuberculosis germs, yea, this
And more!

Show bacilli vile, prolific,
Say physicians, analytic,
Worse than all diseases quarantined
And sore.

Doctors say through osculation
We get sure inoculation
By the sputa and the mucus,
More and more.

Yet I saw there maidens comely,
Saw there women pure, tho' homely,
Saw there women vile and vicious,
Kiss it o'er.

Oh, Virginia, fair creation!
Stop this useless desecration!
Stop disease in propagation,
More and more.

Don't await more information;
Don't let your procrastination
Lead the victims to the harvest
Anymore!

God forgive if I'm offending;
Aid my efforts for the ending
Of this awful desecration and disease
For evermore.

CYRUS P. FLICK.
Norfolk, Va., May 25, 1910.

WEEKLY DIGEST.

**Weekly Digest of ALL the Current Opinions of
ALL the State and Territorial Courts of Last
Resort, and of all the Federal Courts.**

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1. Abstracts of Title—Privity of Contract.—As a general rule, an abstractor can be held liable only to the person who employed him for negligence in making or certifying an abstract of title.—*Thomas v. Guarantee Title & Trust Co., Ohio*, 91 N. E. 183.

2. Accident Insurance—Investigation of Claim.—An accident insurance company having investigated a claim on unverified proofs and denied liability, the beneficiaries were not required to furnish other proofs.—*Fidelity & Casualty Co. of New York v. Cooper, Ky.*, 126 S. W. 111.

3. Adverse Possession—Deed.—Where a grantor conveyed certain vacant land, and the land was not in the possession of any one else, the deed had the effect of giving possession to the grantees so as to preclude adverse possession by one not in actual possession.—*Burke v. Trabue's Ex'x, Ky.*, 126 S. W. 125.

4. Alteration of Instruments—Filling in Blanks.—Where a note was signed by the maker with a blank for the place of payment, the payee or any subsequent holder could fill the blank by writing in a place of payment, either within or without the state.—*Diamond Distilleries Co. v. Gott, Ky.*, 126 S. W. 131.

5. Associations—Agents.—An unincorporated association is not regarded as a legal entity, and it necessarily follows it cannot, as such, appoint or have an agent, though the members may do so for themselves as individuals, and are in such case joint principals.—*Brower v. Crimmins*, 121 N. Y. Supp. 648.

6. Attachment—Rebutting On Two Grounds.—Where a warrant of attachment was issued on two grounds, defendant was not entitled to a dissolution of the writ on rebutting the prima

facie showing made as to one of the grounds, where he admitted the existence of the other.—*Carolina Agency Co. v. Garlington, S. C.*, 67 S. E. 225.

7. Attorney and Client—Retainer.—A retainer is a payment in advance, to cover future services and disbursements until further provision is made.—*Severance v. Bizzallion*, 121 N. Y. Supp. 627.

8. Bankruptcy—Amendment.—Where a bankruptcy petition stated imperfectly the grounds of bankruptcy, it was amendable under the rules for the amendment of pleadings generally so as to state subsequent acts of bankruptcy.—*In re Hamrick, U. S. D. C., N. D. Ga.*, 175 Fed. 279.

9.—Effect of Discharge.—A note dated two days subsequent to a petition in bankruptcy, and not shown to be for a previous indebtedness, is not discharged by the discharge of the maker in a bankruptcy proceeding.—*Cohen v. Pecharsky*, 121 N. Y. Supp. 602.

10.—Infant Bankrupt.—Bankr. Act held to authorize a voluntary adjudication against an infant owing debts for which his property is legally chargeable.—*In re Walrath, U. S. D. C.*, 121 N. Y. Supp. 243.

11. Bills and Notes—Fraud.—Under Negotiable Instruments Law, where a note sued on was obtained by fraud and defendant denied that plaintiff was an innocent holder for value, the burden was on plaintiff to show that it was a holder in good faith.—*Cedar Rapids Nat. Bank v. Myhre Bros., Wash.*, 107 Pac. 518.

12.—Power of Transferee for Collection.—A transferee for collection of a note has such a title as to enable him to sue thereon in his own name.—*Day v. Rogers, Ga.*, 67 S. E. 279.

13. Boundaries—Monuments.—A description of land by courses and distances without mentioning monuments is not controlled by monuments subsequently erected.—*Talbot v. W. K. Smith Security Savings & Trust Co., Oreg.*, 107 Pac. 480.

14. Brokers—Commission.—A broker, employed to procure a tenant for a building, is entitled to a commission if he procures one able, ready, and willing to lease the property upon the owner's terms, if the owner accepts him as a tenant, even though he afterwards refuses to carry out the transaction.—*Cohen v. Ames, Mass.*, 91 N. E. 212.

15. Carriers—Co-partners.—If two or more carriers are co-partners for transporting freight over their respective lines, a contract made by one of them with a shipper binds them all, in absence of a stipulation therein to the contrary.—*Crockett v. St. Louis & H. Ry. Co., Mo.*, 126 S. W. 243.

16. Carriers of Passengers—Crowded Train.—In an action by a passenger for being compelled to ride in a crowded train, the carrier held entitled to show that it had no notice of any extra travel which would require more than the usual train.—*Chesapeake & O. Ry. Co. v. Austin, Ky.*, 126 S. W. 144.

17. Carriers—Liability for Stolen Goods.—Where plaintiff's goods, while in the possession of a common carrier, were stolen, but part of them were found by the police, such carrier was not thereby relieved of his obligation to deliver such part; he having an adequate right to recover them.—*Heyman v. Stryker*, 121 N. Y. Supp. 592.

18.—**Misdelivery.**—A carrier was liable for damages caused by delivering to plaintiff's consignee cattle other than those shipped by plaintiff, irrespective of to whom such other cattle belonged.—Edwards v. Lee, Mo., 126 S. W. 194.

19.—**Riding on Platform.**—A rule that passengers must keep off the platform of moving cars is not inflexible, as a passenger may be compelled by necessity to do so.—Brice v. Southern Ry. Co., S. C., 67 S. E. 243.

20.—**Riding on Platform.**—Whether a passenger injured by being thrown from the platform of the coach by a lurch of the train was guilty of contributory negligence in being on the platform held for the jury.—Central of Georgia Ry. Co. v. Brown, Ala., 51 So. 566.

21.—**Variance.**—Where the only cause of action declared on in the petition was defendant railroad's negligent failure to transport plaintiff's hogs promptly, plaintiff could not recover for injuries to the hogs while being loaded or unloaded by defendant's employees.—Hunter v. St. Louis Southwestern R. Co., Mo., 126 S. W. 254.

22. **Chattel Mortgages—Payment.**—Payment of a chattel mortgage debt divests the legal title of the mortgagor.—Pinckard & Lay v. Bramlett, Ala., 51 So. 557.

23.—**True Value on Sale.**—Where the evidence in the record showed that plaintiffs' agent purchased property at their own chattel mortgage sale, they were thereby made accountable for its true value.—Smith v. French, N. C., 67 S. E. 249.

24. **Commerce—Peddlers' License.**—A statute imposing a tax on peddlers held valid as to transactions not within interstate commerce, though void because imposing an unlawful burden on interstate commerce.—State v. Byles, Ark., 126 S. W. 94.

25. **Constitutional Law—Jurisdiction Not to be Restricted.**—Jurisdiction given to the courts by the constitution cannot be taken away or curtailed by the general assembly, but it may prescribe the mode of procedure by which it is to be exercised.—Redmond v. Quincy, O. & K. C. R. Co., Mo., 126 S. W. 159.

26.—**Right to Sell Intoxicating Liquor.**—No person has a vested right to sell intoxicating liquors, and the regulation of the business, when delegated to a municipality, will not be reviewed when lawfully exercised.—Darby v. Pence, Idaho, 107 Pac. 484.

27. **Contracts—Defense of Forgery.**—Where a written instrument, not declared on, is offered in evidence, defendant may, without formal pleadings, attack it as a forgery.—W. H. Howard Piano Co. v. Glover, Ga., 67 S. E. 277.

28.—**Inadequacy of Price.**—Where parties are competent, and no unfair or fraudulent advantage is taken of one who, with his eyes open, understandingly and freely makes a bad bargain, inadequacy of price will not authorize rescission.—Mathis v. O'Brien, Ky., 126 S. W. 156.

29.—**Pari Delicto.**—A party to an illegal agreement to swindle others, who was himself defrauded by his associates, held not entitled to recover the money lost from one of them.—Schmitt v. Gibson, Cal., 107 Pac. 571.

30. **Corporations—Foreign.**—A foreign corporation, selling to a customer in the state through a traveling agent, need not take out a

license to do business in the state.—Greenbrier Distillery Co. v. Van Frank, Mo., 126 S. W. 222.

31.—**Sale of Land.**—A resolution of the board of directors of a corporation held to authorize a sale of its lands to those shareholders who are not directors.—Davis v. Nueces Valley Irr. Co., Tex., 126 S. W. 4.

32. **Covenants—Easement Not Breach of Covenant.**—The existence of a public easement does not constitute a breach of the covenant of general warranty.—Burke v. Trabue's Ex'x, Ky., 126 S. W. 125.

33. **Criminal Trial—Directing Verdict Against Accused.**—The court may direct a verdict against the state but not against accused, though it may charge that if the jury believe the evidence they will find defendant guilty.—Everett v. Williams, N. C., 67 S. E. 265.

34.—**Right to Grand Jury Minutes.**—One charged with crime is not entitled before or at the trial to the minutes of evidence taken before the grand jury on which the indictment was found, nor to an inspection of the transcript thereof.—State v. Rhoads, Ohio, 91 N. E. 186.

35. **Customs and Usages—Unlawful Customs.**—A custom which would relieve a purchaser from the obligations imposed on him by the doctrine *caveat emptor* is contrary to law.—Thomas v. Guarantee Title & Trust Co., Ohio, 91 N. E. 183.

36. **Death—Widow's Action.**—In a widow's action for damages for her husband's negligent death, plaintiff could testify as to the number and ages of her minor children.—Ogan v. Missouri Pac. Ry. Co., Mo., 126 S. W. 191.

37. **Dedication—State Lands in Municipality.**—Where land dedicated to a particular purpose is situated within a municipality, but is set aside by the state for certain purposes, the municipality cannot divert it; but the power of the state to do so is unlimited, unless there are contract relations or private rights of an abutting owner or other person involved.—Mahoney v. Board of Education, Cal., 107 Pac. 584.

38. **Depositions—Disinterested Party.**—A notary taking a deposition to be used as evidence in a pending case acts in a judicial capacity, and should be entirely disinterested, and, not only in taking down the questions and answers, but in the whole course of the proceedings, he should exercise a judicial discretion.—Redmond v. Quincy, O. & K. C. R. Co., Mo., 126 S. W. 159.

39. **Discovery—Inspection of Premises.**—Where the issue was whether a lessee of a coal mine returned it in the condition required by the lease, the court held authorized to permit an inspection of the premises by the lessee.—Henderson Min. & Mfg. Co. v. Nicholson, Ky., 126 S. W. 139.

40. **Divorce—Lien of Alimony.**—A decree of divorce for future monthly payments held not to create a lien on defendant's property.—Mansfield v. Hill, Oreg., 107 Pac. 471.

41. **Eminent Domain—Value for Tax Purposes Not Conclusive.**—The value of land, though fixed by the owner when assessed for taxation, forms no criterion of its value in a proceeding to condemn it.—Crystal City & U. R. Co. v. Isbell, Tex., 126 S. W. 47.

42. **Escrows—Delivery to Grantee's Agent.**—A delivery of a deed to the agent or attorney of the grantee has the same effect as a delivery to the grantee personally, and cannot be an

escrow.—Alabama Coal & Coke Co. v. Gulf Coal & Coke Co., Ala., 51 So. 570.

43. **Esteppel—Deed to Wife.**—That defendant, who conveyed property to another, who in turn conveyed to defendant's wife, intended the conveyance to his wife to state that it should be her separate property held not to estop him from claiming that he did not intend to give her the property, but conveyed it to her to avoid claims of creditors.—*Du Perier v. Du Perier*, Tex., 126 S. W. 184.

44. **Evidence—Corporation Minute Book.**—A corporation's minute book is evidence both that its contents are correct and that, presumptively, proceedings not therein recited did not actually occur.—*Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

45. **Declarations of Land Occupant.**—The declarations and conduct of a person in possession of land are competent as against himself or one claiming under him to explain his possession, and to show the true character thereof.—*Clary v. Hatton*, N. C., 67 S. E. 258.

46. **Res Gestae.**—Insured's statement, made a few seconds after he was hurt, to the first person who reached him, as to how the accident occurred, held admissible as res gestae.—*Fidelity & Casualty Co. of New York v. Cooper*, Ky., 126 S. W. 111.

47. **Injurious Effect of Certain Prejudice.**—The Court of Appeals will take cognizance of the universal belief among lawyers of the highly prejudicial effect on defendant in a personal injury action of an intimation that defendant is protected by employer's liability insurance.—*Trent v. Lechtmann Printing Co.*, Mo., 126 S. W. 238.

48. **Parol Proof of Written Contract.**—No promise or understanding which the language of a written contract does not itself import can be proved by parol evidence.—*Bradley Gin Co. v. J. L. Means Machinery Co.*, Ark., 126 S. W. 81.

49. **Executors and Administrators—Commissions.**—An executor held not entitled to commissions on the value of real estate divided among the residuary legatees in kind.—*O'Bannon's Estate v. O'Bannon*, Mo., 126 S. W. 215.

50. **Fraud—Investigation by Purchaser.**—A purchaser held not necessarily precluded from recovering for fraudulent representation of the seller, because of consulting with, or receiving information from, others in regard to the subject of sale.—*Neher v. Hansen*, Cal., 107 Pac. 565.

51. **Fraudulent Conveyances—Deed to Wife.**—Where defendant conveyed property to another, for the purpose of having it conveyed to his wife, in order to prevent it from being subjected for his debts, his wife would hold the property in trust for defendant, even if it was conveyed in terms to her separate use.—*Du Perier v. Du Perier*, Tex., 126 S. W. 10.

52. **Gaming—Bank's Loan.**—A bank extending credit to a cotton mill company held not a party to gambling dealings by the company.—*Dowell v. Collin County Nat. Bank of McKinney*, Tex., 126 S. W. 29.

53. **Highways—Automobiles.**—One using an automobile held required to have due regard for the equal rights of others, taking into consideration the tendency of his machine to frighten horses and cause injury to travelers.

—*Haynes Automobile Co. v. Sinnett*, Ind., 91 N. E. 171.

54. **Homestead—Rights of Infant.**—The rights conferred by a probate homestead set apart for the benefit of the widow and minor children of a decedent cannot be surrendered by one or more of the beneficiaries to the detriment of an infant child.—*Sanguinetti v. Rossen*, Cal., 107 Pac. 560.

55. **Homicide—Intent.**—To warrant a conviction of assault with intent to kill, there must be proof of a specific intent to kill.—*Roberson v. State*, Ark., 126 S. W. 88.

56. **Husband and Wife—Wife's Separate Estate.**—Where materials are furnished by authority of a wife for a house on her land, a promise by her to pay for the same is implied.—*Reid v. Miller*, Mass., 91 N. E. 223.

57. **Interstate Commerce—Validity of State Statute.**—Laws 1909, c. 164, § 5, held not a burden upon interstate commerce in violation of the federal constitution, which does not protect an owner of intoxicating liquors in another state who comes into the state to solicit orders therefor.—*State v. Sherman*, Kan., 197 Pac. 33.

58. **Injunction—To Stay Waste.**—Injunction is proper in trespass to try title to stay waste which would result in irreparable injury to property pending the action.—*Holbein v. De La Garza*, Tex., 126 S. W. 42.

59. **Insane Persons—Guardian or Curator.**—An insane person needs a guardian of his person even though he have no property, but a curator only is needed where there is property or property interests to be protected.—*Redmond v. Quincy, O. & K. C. R. Co.*, Mo., 126 S. W. 159.

60. **Interest—Compound.**—It is competent for parties to agree that interest payable at the end of a term shall also bear interest, and if the interest is made payable at a certain time, and is not then paid, it becomes a debt-bearing interest.—*Burke v. Trabue's Ex'x*, Ky., 126 S. W. 125.

61. **Intoxicating Liquors—Selling Without License.**—On a trial for selling whisky without a license, evidence of shipment of whisky to accused held admissible as corroborative of the testimony of a purchase of whisky from accused.—*Sadler v. State*, Ala., 51 So. 664.

62. **Landlord and Tenant—Covenant Against Assignment.**—The law looks with disfavor on attempts to use a covenant in a lease against assignments so as to forfeit the rights of the tenant.—*Murdock v. Fishel*, 121 N. Y. Supp. 624.

63. **Husband and Wife as Tenant.**—Where land was leased to a husband, and both he and his wife lived thereon for the full term, both were estopped to deny the landlord's title, though she did not sign the lease.—*Monroe v. Stayt*, Wash., 107 Pac. 517.

64. **Life Insurance—Delivery.**—Delivery of a life policy to the soliciting agent for delivery to the applicant held a sufficient delivery as to the latter, although he died before actual delivery was made.—*Gallagher v. Metropolitan Life Ins. Co.*, 121 N. Y. Supp. 638.

65. **Resting in Parol.**—An insurance contract may rest in parol.—*McIntyre v. Federal Life Ins. Co.*, Mo., 126 S. W. 227.

66. **Limitation of Actions—Burden of Proof.**—A defendant who pleads the statute of limitations has the burden of bringing himself with-

in the statute, and this burden rests on him throughout all the incidents involved in the plea.—*Pemiscot Land & Cooperage Co. v. Davis, Mo.*, 126 S. W. 218.

67. **Marriage—Mental Capacity.**—In an action to annul a marriage on the ground that one of the parties was mentally incompetent, his mental condition at the time of the marriage must govern the question of his capacity to make the marriage contract.—*Henderson v. Ressor, Mo.*, 126 S. W. 203.

68. **Master and Servant—Actual Knowledge.**—Actual knowledge is not necessary to fix the liability of a master for injuries to a servant through dangerous instrumentalities.—*Lone Star Brewing Co. v. Solcher, Tex.*, 126 S. W. 26.

69. **Assumption of Risk.**—A servant does not assume the risk of injury unless he not only knows the physical condition surrounding him, but appreciates the danger therefrom.—*Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co., Mont.*, 107 Pac. 499.

70. **Carrier to its Employees.**—Since a railroad company is bound to provide a reasonably safe roadbed for the protection of its train employees, it is conclusively presumed to have knowledge of the unsafe condition of its tracks over which its trains run.—*Leggett v. Atlantic Coast Line R. Co., N. C.*, 67 S. E. 249.

71. **Concurrent Negligence of Servant.**—A master held liable for injury to a servant through its negligence, notwithstanding concurrent negligence of a fellow servant.—*Sullivan-Sanford Lumber Co. v. Cooper, Tex.*, 126 S. W. 35.

72. **Defect in Appliances.**—A defect in electrical apparatus used in operating a printing press, which allowed the press to start suddenly when the power was turned off, was not latent, though hidden from view and discoverable only by an expert examination.—*Oborn v. Nelson, Mo.*, 126 S. W. 178.

73. **Defect of Apparatus.**—A railroad company was bound to know that in the course of time guy chains of a hoisting derrick boom would become unsafe from wear and natural causes, and would be negligent if it waited for them to break before strengthening or replacing them.—*Ogan v. Missouri Pac. Ry. Co., Mo.*, 126 S. W. 191.

74. **Duty to Furnish Safe Appliances.**—Where it is the duty of the foreman in a saw-mill to keep the machinery in proper condition, he represents the master in the performance of a nondelegable duty, and is not a fellow servant of the sawyer.—*Quinn v. Glenn Lumber Co., Tex.*, 126 S. W. 2.

75. **Duty to Warn.**—A master is not required to caution a servant against unexpected, improbable, and unusual occurrences, but only against the usual and probable consequences that may flow from the exercise of proper care and attention while performing the duties of the employment.—*Conkey Co. v. Larsen, Ind.*, 91 N. E. 163.

76. **Duty to Warn.**—A master is required to warn even an adult servant of dangers attendant on the operation of machinery when he knows he is inexperienced.—*Ghaner v. Leaphart Lumber Co., S. C.*, 67 S. E. 242.

77. **Injuries.**—In an action for injury to plaintiff while working in defendant car com-

pany's yards by a pile of pig iron falling upon him, the burden was on plaintiff to show that the pile fell because of inherent defects therein which were known to defendant or should have been known to it by exercising ordinary care.—*Bowman v. American Car & Foundry Co., Mo.*, 125 S. W. 1120.

78. **Inspection.**—In an action for injuries from a defective printing press, evidence by defendant that he had it inspected daily by an expert did not conclusively show him free from negligence, since the jury might disbelieve him.—*Oborn v. Nelson, Mo.*, 126 S. W. 178.

79. **Liability of Independent Contractor.**—A manufacturing company, installing a machine for a railway company, furnishing employees for that purpose, held jointly liable with the railway company for negligence in the work whereby an employee was injured.—*Fliege v. Kansas City Western Ry. Co., Kan.*, 107 Pac. 555.

80. **Safe Place to Work.**—Where the master furnishes his servants a reasonably safe place to work, he is not liable for a transitory danger arising out of a single occurrence in which he is not at fault, and of which he has no notice or opportunity to correct.—*Redmond v. Quincy, O. & K. C. R. Co., Mo.*, 126 S. W. 159.

81. **Mines and Minerals—Location.**—Plaintiff in an adverse suit cannot set up that a third person has made a subsequent location of the same property, where his suit is not based on such location.—*Snowy Peak Mining Co. v. Tamarack & Chesapeake Mining Co., Idaho*, 107 Pac. 60.

82. **Municipal Corporations—Governmental Capacity.**—Municipal corporations held not liable for misfeasance of their officers acting in a governmental capacity.—*Edson v. City of Olathe, Kan.*, 107 Pac. 539.

83. **Individual Liability.**—Officers of a city are not individually liable for the improper exercise of discretionary powers.—*Browne v. City of Bentonville, Ark.*, 126 S. W. 93.

84. **Reasonableness of Ordinance.**—On a trial for violating a municipal ordinance, the question of the unreasonableness of the ordinance is not raised without a pleading or proof that it is.—*City of St. Louis v. Warren Commission & Investment Co., Mo.*, 126 S. W. 166.

85. **Reasonable Use of Sidewalk.**—Defendants as implement merchants in a city were entitled to the reasonable use of the street and sidewalk to get merchandise in and out of their business place, subject to a proper regulatory ordinance.—*McKee v. Fetors, Mo.*, 126 S. W. 255.

86. **Void Ordinances.**—A city ordinance passed on a date when the council had no power to sit held void.—*City of Glasgow v. Morrison-Fuller, Mo.*, 126 S. W. 236.

87. **Negligence—Inference.**—Where the evidence permits an inference of negligence, and also as an inference of a cause which is not negligence, no case is made.—*Quisenberry v. Metropolitan St. Ry. Co., Mo.*, 126 S. W. 182.

88. **Primary Negligence.**—One guilty of primary negligence held not relieved from liability by unforeseen concurrent cause.—*Watson v. Kentucky & Indiana Bridge & R. Co., Ky.*, 126 S. W. 146.

89. **Proximate Cause.**—Where gas was

generated in a street from gasoline running from a derailed tank car, and it exploded when a person struck a match, held, that if his act was merely inadvertent or negligent, the railroad company's negligence was the proximate cause, but if his act was malicious, that was the proximate cause.—Watson v. Kentucky & Indiana Bridge & R. Co., Ky., 126 S. W. 146.

90.—**Wanton Injury.**—A complaint charging wantonness is not answered by a plea of contributory negligence.—Birmingham Ry., Light & Power Co. v. Selhorst, Ala., 51 So. 568.

91. **Parent and Child—Father's Suit for Child's Injury.**—Where a railroad conductor, with knowledge that plaintiff's son was under age, permitted him to work on the train as a brakeman without the father's consent, and he was injured, the father was entitled to recover for nursing, medical attention, and loss of service.—Hendrickson v. Louisville & N. Ry. Co., Ky., 126 S. W. 117.

92. **Partition—Improvements.**—Right to partition in kind cannot be defeated by one of the co-owners putting improvements on some of the lots at his own expense and for his own benefit.—Timberlake v. Sorrell, La., 51 So. 586.

93. **Payment—To Payee After Transfer.**—Payment of a note by the maker to the payee after transfer to plaintiff held to have discharged the maker's liability thereon.—Diamond Distilleries Co. v. Gott, Ky., 126 S. W. 131.

94. **Pledges—Authority to Sue.**—An agreement that a pledged account should be sued in the pledgor's name, if suit were necessary, held not to show the pledgor's authority to sue, as against the defendant.—Selleck v. Manhattan Fire Alarm Co., 121 N. Y. Supp. 587.

95. **Principal and Agent—Liability of Agent.**—An agent may become liable on a contract contrary to his actual intent and if he contracts in such form or under such circumstances as to make himself personally responsible he cannot afterwards, whether his principal was or was not known at the time, relieve himself of responsibility.—Leterman v. Charlottesville Lumber Co., Va., 67 S. E. 281.

96.—**Ratification.**—The presumption of ratification will arise on slight evidence when the act is plainly for the benefit of the principal.—Davis v. Nueces Valley Irr. Co., Tex., 126 S. W. 4.

97. **Principal and Surety—Usury.**—In action on note, where surety defends on ground of usury, evidence of his knowledge of the usury when he signed the note held admissible.—Jones v. Pope, Ga., 67 S. E. 280.

98. **Railroads—Adverse Possession.**—That there may be adverse possession of part of a railroad's right of way by the owner of the fee, held, the company must have notice other than from erection of an inclosure.—Atlantic Coast Line R. Co. v. Epperson, S. C., 67 S. E. 235.

99.—**Damages for Killing Animal.**—In an action for killing a mule, plaintiff held entitled to recover its value, expenses incurred in caring for it, and loss of its services during its illness.—Jones v. Texas & P. Ry. Co., La., 51 So. 582.

100.—**Exceeding Speed Limit.**—It is negligence for a railroad company to operate its train at a rate of speed forbidden by law.—Illinois Cent. R. Co. v. Sumrall, Miss., 51 So. 545.

101.—**Recovery for Noise.**—The right of an owner of property abutting on a street to re-

cover for damages caused by the operation of trains on the street held not to depend on a defective construction of the road over the street, or negligent operation of the trains.—Trinity & B. V. Ry. Co. v. Jobe, Tex., 126 S. W. 32.

102.—**Sparks.**—A railroad company is not liable for damages done by sparks from its engines, where the latter are equipped with the most effective spark arresters in general use, unless there is negligence in the management of the engines.—Cincinnati, N. O. & T. P. Ry. Co. v. Sadilevle Milling Co., Ky., 126 S. W. 118.

103. **Replevin—Undivided Interest.**—Replevin will not lie for an undivided interest in personal property.—McDonald v. Bailey, Okl., 107 Pac. 523.

104. **Sales—Delivery.**—Where a contract for the sale of lumber divided the lumber into a number of separate orders, but did not specify when the order should be given for delivery, it contemplated that the shipments should be ordered within a reasonable time.—Ogburn-Dalchau Lumber Co. v. Taylor, Tex., 126 S. W. 48.

105.—**Replevin.**—Where goods are sold, the title being retained in the seller, and the buyer defaults, the seller may recover the property in replevin.—Mizell Live Stock Co. v. J. J. McCaskill Co., Fla., 51 So. 547.

106. **Set-Off and Counterclaim—Unliquidated Damages.**—When the demands of both parties spring out of the same contract, defendant may assert a claim for unliquidated damages under his common law right of recoupment, or under Code 1904, sec. 3299.—Leterman v. Charlottesville Lumber Co., Va., 67 S. E. 281.

107. **Street Railroads—Children on Street.**—A street railroad company is required to exercise a much higher degree of care to refrain from injuring children on the streets than it owes to adults.—Childress v. Southwest Missouri R. Co., Mo., 126 S. W. 169.

108. **Taxation—Recovery of Illegal Taxes.**—Illegal taxes voluntarily paid cannot be recovered by the taxpayers.—Tillamook City v. County Court of Tillamook County, Oreg., 107 Pac. 482.

109. **Telegraphs and Telephones—Conflict of Laws.**—A contract for the transmission and delivery of a message is, as to its nature, obligation, and validity, governed by the law of the place of performance.—Western Union Telegraph Co. v. Fuel, Ala., 51 So. 571.

110.—**Conflict of Laws.**—Where the contract for a telegram and the negligence occurred in states where no damages for mental anguish were recoverable, plaintiff could not recover such damages in Arkansas.—Western Union Telegraph Co. v. See, Ark., 126 S. W. 78.

111. **Vendor and Purchaser—Liability of Vendor.**—A vendor, in case no warranty is stipulated in a deed of sale, on its being held void, is liable for the restitution of the price, but is not liable for the fee of the attorney for defending the suit and calling him in warranty.—Germillion v. Roy, La., 51 So. 576.

112.—**Misrepresentation.**—A vendee is entitled to rely on representations of his vendor, where the property is at a distance, or where for any other reason the falsity of the representation is not readily ascertainable.—Lindsay v. Davidson, Wash., 107 Pac. 514.

113.—**Notice of Easement.**—Where at the time a purchaser acquired land she had notice of a public easement in the land, she was charged with knowledge of the inconvenience resulting from it.—Burke v. Trabue's Ex'x, Ky., 126 S. W. 125.

114.—**Tax Sales.**—A purchaser of land from heirs of one who held it as agent pending suit by the principal's heirs for possession held to take no better title than his vendors had and not to be an innocent purchaser under the recording act.—Hudson v. Herman, Kan., 107 Pac. 35.

115. **Wills—Undue Influence.**—Undue influence may be exerted on testator, so as to render his will invalid, either by fraudulent means or device, or by physical or moral coercion practiced on him without any continual deception.—Whitcomb v. Whitcomb, Mass., 91 N. E. 210.

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OUSTER THROUGH BILL IN EQUITY OR INFORMATION BY ATTORNEY GENERAL.

It may be we are mistaken, but it seems to us that Mr. Justice Holmes would have done better to have pronounced the contention, that corporations are denied the equal protection of the laws under the Fourteenth Amendment in a proceeding by bill in equity for violating state law, merely frivolous, than to have discussed and denied it in the way he did in the recent case of Standard Oil Co. of Kentucky v. Tennessee, 30 Sup. Ct. 543.

The learned justice, who was with the minority (and then on the right side as it seemed to us) in W. U. Tel. Co. v. Kansas, 216 U. S. 1, 70 Cent. L. J. 291, proceeds in this later opinion like one who is "walking on eggs," and as if he were trying to put down some words merely by way of preamble for a conclusion to which there was no dissent.

And yet it looks to us as if there was call for a salutary principle and possibly a psychological moment for its announcement.

Here is the way the learned judge speaks of the argument advanced that the corporation should have been convicted by a jury upon proof beyond a reasonable doubt before there could be any judgment of ouster, because thus individuals must be proceeded against before any consequence can attach to the commission of a criminal offense.

"The foregoing argument is one of the many attempts to construe the Fourteenth Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment. The law of Tennessee sees fit to seek to prevent a certain kind of conduct. To prevent it the threat of fine and imprisonment is likely to be efficient

for men, while the latter is impossible and the former less serious to corporations. On the other hand, the threat of extinction or ouster is not monstrous, and yet is likely to achieve the result with corporations, while it would be extravagant as applied to men. Hence, this difference is admitted to be justifiable. But the admission goes far to destroy the argument that is made. For if a fundamental distinction may be made in the evils that different delinquents are forced to suffer, surely the less important and ancient distinction between the modes of establishing the delinquency, according to the nature of the evil inflicted, even more easily may be justified. The supreme court of the state says that the present proceeding is of a civil nature; but assuming that nevertheless it ends in punishment, there is nothing novel or unusual about it. We are of opinion that subjection to it, with its concomitant advantages and disadvantages, is not an inequality of which the plaintiff in error can complain, although natural persons are given the benefit of the rules to which we have referred before incurring the possible sentence to prison, which the plaintiff in error escapes."

How easy it would have been to deny unequivocally, that it is true that an individual must be convicted upon indictment and presentment by a jury of his peers before he can be made to suffer for his criminal misdeeds. A public official may be removed after he is shown in other ways than by trial upon indictment to have been guilty of crime. An attorney at law may be disbarred by showing otherwise than by trial before a jury that he deserves to be, because there is evidence of his committing a crime.

The learned justice, whose tenure of life-office is qualified by his being of "good behavior," could not demand a jury of twelve men to try an accusation that he was not, whatever might be the alleged quality of his lapse therefrom. And, if a guardian, executor or other trustee abuses his trust, his malversation in a criminal way does not have to be established by

prosecution on the criminal side of the court to justify his removal.

But we are not required to consider an individual in his relative character of trust or confidence reposed to prove, that to do anything else than fine or imprison him, no trial by jury is demandable. A continuing trespass, that may amount to a misdemeanor may be enjoined in equity, and a public officer may enjoin or abate a public nuisance without first presenting or indicting or trying by jury. Reference to statutes on the subject of intoxicating liquors may supply all the illustration this statement needs.

What is ouster of a foreign corporation but a kind of permanent injunction against the maintenance of what public policy has, in effect, declared to be a nuisance? When a visitor of this sort has established a course of trade-dealing, which is at war with a state's view of its domestic economy, its bad manners, so to speak, may merely lend intensity to the offensiveness of the nuisance it has committed, but it can be enjoined or abated, independently of that.

But a foreign corporation occupies a relative position, which by the course of decision has a widening vista in such decisions as the telegraph case *supra* and International Text Book Co. v. Pigg, 217 U. S. 91. Yet it is something of a visitor, from whom the state may withdraw its hospitality.

But even, if that become an antiquated conception, a state may not have to be so excessively considerate of corporations, foreign and domestic, all being indistinguishable except in a marathon to a federal court, that it must permit them to be injunction-proof in the maintenance of a course of conduct, which sets at naught a state's public policy.

There is supposed to be in legal conception the establishment of a condition for which a defendant may be held responsible. If specific penal offenses create it, it seems absurd to say that they, being evidentiary facts in the proposition, must be

proven beyond a reasonable doubt, or before a jury on indictment.

Judge Holmes' words are not the sort which help us to retain our grasp on fundamental principles. On the contrary, they are more suggestive of a non-reliance on such principles, than inspiring confidence in what is said.

We would prefer to have been told, that the right of ouster may be established, as it was established, not because it was necessary to treat a corporation differently from an individual, but because this was a legal way to abate a nuisance by whomsoever committed. There was simply a question of inculding process to carry a judgment into effect. You expel a corporation; you tie the hand of an individual, but you proceed to judgment against both in the same way.

NOTES OF IMPORTANT DECISIONS

ACCIDENT INSURANCE—INJURIES FROM CONTACT WITH POISONOUS SUBSTANCES.—The sway of the principle that in insurance contracts construction will be in favor of the insured, has, according to the Iowa Supreme Court, emphasis given to it by the English language. *Simpkins v. Hawkeye Com. M. Assn.*, 126 N. W. 192.

That court added to its allusion that: "There is such a fortunate, if not providential, flexibility and richness of meaning in words of the English language that the courts are not often seriously embarrassed in minimizing, if not wholly neutralizing, any apparent injustice of this (the one considered) nature." Whatever its "flexibility and richness," an insurance company might not think the court here spoke very ambiguously.

The particular "injustice" the court was considering was the claimed result of an undertaker, who accidentally cut his finger, and was poisoned by embalming fluid, falling within an exception of "contact with poisonous substances."

It was said to be the theory that "where death has resulted from blood poisoning following a wound, the theory is that death is in a legal sense the result of the wound, and the infection of such wound is a mere incident to the original injury." But how the mere progress of a wound in virulence, generating

poison as it progresses, is like this kind of case, we are unable to see. If one touches embalming fluid with his finger, ordinarily, he does not come in contact with a poisonous substance, because as he touches it it is not poisonous. If he touched it with his tongue it might be a "poisonous substance," because such contact affects him poisonously. Why is it not the same with a slit finger?

The opinion cites a number of cases along the line stated, but do they apply? Take the illustration of touching what is called "poison oak." Shall it be said if one has no abrasion on his skin he cannot recover, but if he has, he may, because the abrasion is the origin of his injury?

If disease from a mosquito bite was excepted, could it be said, but the bite would have caused no injury, if it had not been on an existing sore? We think the court needed something more than a luxuriant language to save the insurance in question.

APPEAL AND ERROR—LAW OF THE CASE ON SUBSEQUENT APPEALS.—The principle, that the law of a case as decided on first appeal is the law of the case on subsequent appeals, has been stated over and again. But whether such a doctrine is essentially true in principle, or courts feel merely justified in applying it so as to refuse to re-examine a former holding, may well be doubted.

A late case by the Wisconsin Supreme Court has said it would even apply as to the constitutionality of a statute upon which a right of action depended. *Kiley v. Chicago, M. & St. P. R. Co.*, 125 N. W. 464. But in that case the court did re-examine, for incidental reasons, the question and arrived at the same conclusion as before, by force, possibly of a sort of habit, which might be "more honored in the breach than the observance," of traveling over the same ground again. In a Massachusetts case a considerable number of cases of that jurisdiction and one federal supreme court case is cited to the proposition that: "It is not the practice of the full court to rehear parties upon questions which have once been argued and decided, or to hear them upon questions of law which have been waived or abandoned at a former hearing; but it in its discretion may do so." *Bar Assn. of Boston v. Casey*, 90 N. E. 584.

As further showing how unstable the statement first above made is deemed as an absolute principle the case of *Coal Co. v. Quinn*, 106 Pac. 1101, decided by the Colorado Supreme Court, is pertinent. There it was held, that though a decision by the (Colorado) court of appeals is the law of the case on a subsequent trial,

it is not so for the supreme court on a subsequent appeal. Why not, pray? If one is at the end of his row before the case goes back to be retried, why should the accident of a second appeal going to another court change the matter?

It is more logical to say here is just a fair excuse for a court not re-examining a question, because where a party's status is not changed pending litigation the court in final disposition should apply what it believes to be the law of the case. Appellate courts are not constituted merely to decide causes. They are to create precedents for others. A particular litigant is no more than a pawn on the chessboard of public interest. He should be moved about in subordination to that interest.

"THEORY OF THE CASE"—WRECKER OF LAW.¹

IV.

The structure of the law has been destroyed in the opinion of many prominent jurists.² We are now contemplating the wreckage. Naturally in casting about for means of restoring the ruined edifice, we are all solicitous to know what it is that has produced a condition of the law which is described by one eminent lawyer as "appalling."³

If the cause of our deplorable condition can be distinctly pointed out, so that the whole profession may recognize it, is it not apparent that we will, then and then only, be ready to begin the restatement of the law⁴ and the preparation of the lawyer for higher duties than those of a case-hunting drudge?

To effectuate this reform, the stumbling blocks must be removed. It is therefore in order to point out these stumbling blocks, with a view to their elimination from our future decisions and texts.

Is there not the greatest danger, nay,

(1) For three former articles, see 70 Cent. L. J., 294-298; 311-314; 402-407.

(2) Greenbag, February, 1910.

(3) 34 Am. Bar Ass'n 787, address of Franklin M. Danaher; William R. Hornblower, p. 99 Greenbag, *supra*.

(4) See title page, *Wigmore's Code of Evidence* (1910).

even the greatest certainty, that if the legal structure is rebuilt (necessarily out of the remains of the first institution) the defective materials which caused the present havoc will, unless the greatest care is exercised, be re-incorporated in our juridical edifice?

It therefore behooves us to go slow. It behooves us to point out and distinguish from the mass of our building material, the defective stuff which if used again, will bring upon us a repetition of our grief and humiliation. Admitting the fact of the existence of the wreckage of the law, as we must, and that the profession has been led into error by someone, we would naturally expect, *a priori*, to find that the misleading has been done by some supposedly high authority. Otherwise, we certainly would never have consented, blindly and passively, to follow in his footsteps, to our destruction. This *a priori* reasoning must be the explanation (and the excuse, should one prove necessary) for this present criticism of such eminent names as Chitty, Stephen and Gould, who have led the way for a century and the results of whose teachings are now before us.

Procedure is one of the most, if not the most, important subject of the law. Unfortunately it has also been one of the most abused and neglected. Knowledge of procedure necessitates knowledge of the whole law; and, *e converso* the "substantive" branches of the law cannot be understood without a knowledge of Procedure. Yet we have become inoculated with the idea that the law can be partitioned and studied in individualized branches, while the very process has permitted its life forces to escape us. We are taught by learned authors that procedure is a local, statutory affair; that there are no fundamental, immutable principles in procedure; that the student need but learn the main body of principles of the "substantive" law, and procedure will take care of itself.

These writers are correct: Procedure has taken care of itself. It has asserted itself and demonstrated its position by

wrecking the house built in ignorance of its fundamental laws. We have ignored it, and its vengeance is upon us. We have "eliminated technicalities" with just about the same success that would attend an architect's effort to "eliminate" solid ground under his structure. We have heard of the house that was builded on the sand.

In the three previous articles of this series, the operation has been shown both in "substantive" and "adjective" law, of some of the principles of Procedure. These articles are "hereby made a part hereof" to help carry the argument.⁵ Further illustrations of procedure operating in contract, tort, crime and equity, will be given in subsequent papers. For the present, the reader is asked to assume that Procedure profoundly influences "substantive" law. Particularly is this true of that part of Procedure we call pleading.

If so, then works like Chitty, Stephen and Gould on Pleading, studied and followed as they have been for a century, by student, lawyer, author and judge, must have profoundly affected the whole body of the law.

And yet these works show that their authors did not understand the fundamental rules of Procedure. They nowhere cite these rules. They do not show that the maxim *De non apparentibus et non existentibus eadem est ratio* (what is not judicially presented cannot be judicially decided) lies at the base of pleading.⁶ They do not see the state in pleading, but regard the matter as one entirely between the parties. According to these authors, pleadings are only to apprise the opposite party, or the court, of the issues. Out of such a conception of the function of pleadings and of the interests of the public, has grown the idea that, if only the parties consent, pleadings may be waived in order to enable the contestants "to get at the merits."⁷

Such views of pleadings are being en-

(5) See note 1 for references to previous arguments.

(6) 2 Hughes Gr. & Rud.

(7) Thompson on Trials.

couraged among us to-day by senseless and harmful attacks upon public policy as a ground and rudiment of law. These pernicious arguments pervade the air and are gratuitously scattered among students. Justinian protected his students from commercialism and quackery.

The interactions between *res adjudicata* and collateral attack, on the one hand, with pleadings on the other, growing out of the fact that the same principles underlie both, are nowhere suggested in these texts, as tests of correct pleading, by either Stephen, Chitty or Gould. Certainly the courts and authors of this generation have not understood them as asserting any such tests. Yet it is clear that the interests of the public demand the statement of "a cause of action," not merely to apprise the defendant, or the court, but that on collateral attack, it may be determined what, if anything, was litigated. If so, how can pleadings be waived, as is now contended by the editors of these works?⁸

Indeed, Chitty himself expressly states that a reply may be waived; and this has misled others and encouraged them to advocate the "theory of the case."

The writer is unable to pick out of Stephens a good definition of pleadings—one that will cover their whole scope and purpose, of investing the court with jurisdiction; of limiting issues and narrowing proofs; and of conserving the interests of the state by establishing a record from which all may know what was decided.⁹

If this be denied, we appeal to the irreconcilable decisions in Missouri, New York, Illinois and all the "Theory of the case" states. These states have piled up mountains of cases on what can and what cannot be waived, in order to allow the parties to have their fight¹⁰ before the court unrestrained by the state's record.

Origin of the "Theory of the Case."—It would seem that this whole discussion, and the erroneous views of waiver that have

(8) Andrews' Steph. Pl. Sec. 230: cases 42 Ed.)

(9) 4 Gr. & Rud., p. 939, tit. Pleadings.

developed out of it, took rise in a note of Serjeant Williams to the case of *Stennel v. Hogg*,¹¹ which reads as follows:

"With respect to the former (imperfections in the pleadings which are cured at common law by verdict) case, it is to be observed that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated, or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict by the common law."

On close reading, the ambiguity and contradiction in this statement will appear. Serj. Williams, in effect says that *defects of substance, fatal upon demurrer*, are cured by verdict. This, of course, is absolutely contrary to the cases of *Rushton v. Aspinall*,¹² by Lord Mansfield, and *Jackson v. Pesked*,¹³ by Lord Ellenborough, both of which Serj. Williams cites in his note. It has been held in a great number of cases that it is beyond the power of a legislature to make a good cause of action out of one fatally bad. Neither can there be any question but that a single defect of *substance fatal on demurrer*, makes a pleading fatally bad. It appears expressly by the above language that Serjeant Williams did not have in mind merely the imperfect statement of matter of substance. This would be merely matter of form, and would be curable. He extends the cure to matters of substance "*omitted*." Illinois has been led into error by this quotation and mischievous decisions have followed.¹⁴

Later in the note Serj. Saunders takes this turn: "But still, if the plaintiff either states a defective title, or totally omits to state any title or cause of action, a verdict

(10) See "Theory of the Case," 4 Gr. & Rud.

(11) 1 Wms. Saunders, 228, n. 85 English Reprint 244, n. 248.

(12) Smith's Lead. Cas., 8th Ed., L. C. S. Hughes' Gr. & Rud. 5.

(13) 2 Maule & S. 224, quoted by Chitty and Stephen, 85 Eng. Reprint, 248.

(14) Chicago R. R. v. Hines, 132 Ill. 161, 166.

will not cure such defect, either by the common law or by the statutes of jeofails."

Can the reader reconcile these two statements? According to the last quotation "if the plaintiff states a defective title" (apparently a formal defect would be included) it is fatal! Of course, Serj. Williams does not mean this. But look at what he says.

Then,—a more serious matter,—according to the first quotation, the omission of matter of substance, making a defect "fatal on demurrer," is cured. Now, if a single fact which is matter of substance, be omitted, the defect is fatal.¹⁵ There would then be, necessarily, a total failure of a cause of action, and this is cured, according to quotation No. 1. Yet according to quotation No. 2, it is fatal.

Then comes Stephens. He first quotes approvingly the language of Lord Ellenborough in Jackson v. Pesked (S. P. in Rushton v. Aspinall), as follows:

"Where a matter is so essentially necessary to be proved that had it not been given in evidence the jury could not have given such a verdict, there the want of stating that matter in express terms in a declaration, provided it contains terms sufficiently general to apprehend it in fair and reasonable intendment, will be cured by a verdict."

This language of Lord Ellenborough expresses the correct doctrine, and the extreme limits of the doctrine of aider by verdict. But Stephens then immediately goes on with this remarkable statement:

"In entire accordance with this are the observations of Mr. Serjeant Williams: 'Where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the fact so defective or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission is cured by the verdict.'

Query: Is Serjeant Williams' language

(15) Rushton v. Aspinall; Jackson v. Pesked, supra. Sto. Eq. Pl. sec. 10; U. S. v. Cruikshank, L. C. 232, 3 Gr. & Rud.; Slacum v. Pomery, 4 Gr. & Rud.

"in entire accordance" with Lord Ellenborough's? We leave the profession to judge.

Does not the introduction of the word "substance" in Serjeant Williams' statement make a line of *impassable difference* between his statement and that of Lord Ellenborough? Do not the words "fatal objection upon demurrer" also mark an impassable line?

Broom says that defects of substance cannot be waived,¹⁶ and so do Story, Marshall and Kent.

Do not these facts indicate a line of fundamental difference between two classes of writers, in one of which is included Stephens, Chitty, Gould and Thompson, and in the other of which is included Lord Mansfield, Lord Ellenborough, Story, Kent, Shaw, Broom and Marshall? If they do, who have the profession been following?

Bliss is perhaps by general acknowledgment our best writer on code pleading. In Section 141 he lays it down that the student of the code must be familiar with the common law and equity systems of pleading. "If not, he is groping in the dark and much that is important will escape his apprehension."

Admitting this to be true, suppose the student applies to Stephens, Chitty or Gould for this needed information, and meets the facts we have outlined above, will he get the light he seeks? Can the student from the authors last named learn the fundamentals of procedure?

On the other hand, suppose the student takes up Story's Equity Pleadings and reads in Section 10 the following:

"But whatever may be the object of the bill, the first and fundamental rule which is always indispensable to be observed, is that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver or course of proceeding by the parties; for consent cannot confer a jurisdiction not vested by law. And, although many errors and irregularities may be waived by the parties, or be cured, by not being objected to, the court itself cannot act except upon its own intrinsic

(16) Bro. Max., 136-137; 181-182 (8th Ed.)

authority in matters of jurisdiction; and every excess will amount to a usurpation, which will make its decretal orders a nullity, or infect them with a ruinous infirmity."

Here we find the true rule. A statement of a cause of action—implying, as it does, a pleading—is juridical. Without it the proceeding is *coram non judice*. It is this statement of a cause of action that vests the court with intrinsic authority to proceed.

As Judge Lamm well said, in the case of State ex rel. Muench,¹⁷ after contrasting the older common law with its more developed form:

"But in modern jurisprudence a court remains passive until issues are framed in accordance with written law and their judgments must respond to such issues. A judgment is 'the sentence of the law upon the record.' It is the application of the law to the facts and pleadings. Any other view (i. e., Theory of the case) would be illogical and tend to confusion and chaos in the administration of justice. Black v. Early, 208 Mo. l. c. 313, and cases cited. Speaking to the point, we quote with approval from a sound authority: 'The judicial power can be set in motion in civil matters only by some person—using the word in its broadest sense—in a case against another person. The courts cannot, *ex mero motu*, set themselves in motion, nor have they power to decide questions except such as are presented by the parties in their pleadings. The parties by their attorneys make the record, and what is decided within the issue is *res adjudicata*; anything beyond is *coram non judice* and void.' Andrews' Stephen's Pleading (2d Ed.), p. 34; see, also, Reynolds v. Stockton, 140 U. S. 254."¹⁸

This is undoubtedly the law, and the standpoint of *res adjudicata* is well introduced in the quotation. The sub-quotation is not from Stephens, however, but is from the introductory chapter of the editor. Judge Lamm also cites the great Leading Case of Munday v. Vail, 34 N. J. Law, 422.¹⁹

Suppose the student goes likewise to Mansfield, Ellenborough, Kent, Marshall or Shaw, and finds that they are in entire accordance with the above quotations

from Story and Lamm, will he not from these writers learn the true doctrines of the common law respecting pleading? Cannot the student work out for himself from Story's Section 10 the position that defects subject to the general demurrer are never waived; that the general demurrer, whether under that name or under the name of motion in arrest, *non obstante verdicto*, order of repleader, *res adjudicata* or collateral attack, goes through the whole record and attaches to the first fault; that the statute of jeofails cannot and does not cure "omitted matter of substance, fatal on demurrer."

Supposing the student was thoroughly taught Rushton v. Aspinall,²⁰ Dovaston v. Payne,²² Jackson v. Pesked,²³ and Windsor v. McVeigh,²⁴ what work on common law pleadings would be equal to this instruction?

If the reader desires to ascertain the condition of the students of our law schools upon the questions above discussed, let him but catechise them. Here is about the way the conversation will go: Q. What work on pleading did you study? A. Stephens. Q. Were you taught it thoroughly? A. Yes, we learned it nearly by heart. Q. Do you remember what Stephens said about Jackson v. Pesked, and the quotation he made from it? A. No, sir. Q. Do you remember the quotation from Serjeant Williams in Stephens'? A. No, sir. Q. Then you don't know whether these quotations are diametrically opposed or not? A. No, I do not. Q. Do you remember Stephens' rule that the demurrer searches the entire record and attaches to the first fault? A. Yes, I have heard of it. Q. Do you also remember what he said about aider by pleading over, by verdict and the statute of jeofails? A. Yes, he said something about it. Q. Now, would it be possible to plead the general demurrer to a case where there was any

(17) 217 Mo. 137.

(18) L. C. 79a, 3 Gr. & Rud.

(19) L. C. 79, 3 Gr. & Rud.

(20) L. C. 5, 3rd Gr. & Rud.

(21) L. C. 135 id.

(22) L. C. 217 id.

(23) L. C. 232a id.

(24) L. C. 1 id.

one of these three kinds of aiders? Would it be possible to do it? A. I don't know. Q. Do you remember the three kinds of aider advocated by Chitty, Stephens and Gould? A. No, I do not. Q. Do you know anything about Coke's three degrees of certainty? A. No, sir.

Further questioning might reveal a still greater lack of acquaintance with important principles.

Q. Suppose a matter of substance is omitted from the statement of a cause of action. The case goes to verdict. Does the rule, that the general demurrer searches the whole record and attaches to the first fault still apply, or does the rule of aider by verdict apply? A. I don't know. Q. Was your attention called to the question at school whether there is anything inconsistent between Stephens' two statements first, that matter of substance omitted from a declaration, which would be a fatal objection on demurrer, is cured by verdict; and, second, that where there is a failure to state a cause of action, the failure is not cured by verdict? A. No, sir. Q. Do you understand that the code system of pleading is fundamentally different from that of the common law and equity? A. Yes, sir. Q. Don't you know that the fundamental principles applicable to all systems of pleading can be picked out of Section 10 of Story's Equity Pleading? A. No, sir, I never read that section. Q. Do you know that Bliss on Equity Pleading says that to understand the principles of a code the student must understand the principles of common law pleading? A. No, sir. Q. Does not that statement indicate to you that the principles of the two systems are the same? A. Yes, sir, it does.

We leave it to the reader to judge whether a student graduating in this condition has been grounded in the fundamental principles of procedure.

The main difficulty about these procedural troubles is that we have become involved in unending discussions about triv-

ialities, and in the confusion, have forgotten the fundamentals.

Take Serjeant Williams' "learned" note as an example. What a prolific source of error it has proved. The note is an attempt to mark a line of distinction between defects that are cured after verdict by the common law and defects that are cured after verdict by the statute of jeofails. What the difference amounts to, he does not state, but merely says there is a difference. There may have been, and may not. We are told on good authority that there is no difference; that the statute of jeofails "is only a declaration of the common law."²⁵

But that is not the point. The point is that in making this distinction, Serj. Williams totally overlooked the harm he might do to jurisprudence.²⁶ He made an opening for the "Theory of the Case" doctrine, in countenancing the possibility of curing a fatally defective pleading—a nullity. He did not understand the maxim, *Debole fundamentum, fallit opus* (where the foundation fails, the whole superstructure falls).²⁷ He did not know that maxim as a rule of pleading. He did not know its cognate maxim, *De non apparentibus, etc.* (what is not juridically presented cannot be judicially decided) as a rule of pleading.

He did not understand the effect of putting in those words "substance" and "fatal objection on demurrer." He made a mistake and it has done incalculable harm. The theory of the law was disarranged; its harmony was broken. The error spread through its entire structure; and has been taken up and approved by the writers above named and by others equally popular, until now it is solemnly laid down as law, "too well settled to be shaken," that one man can take the property of his fellow without ever setting up a cause of action against him. If such be the law, what becomes of our boasted "due process of law"; what

(25) Bliss, Code Pl., Sec. 442; Welch v. Bryan, 28 Mo. 30; Frazer v. Roberts, 32 Mo. 457.

(26) *Uno absurdo dato infinita sequuntur.* 4 Gr. & R. 1084.

(27) 2 Gr. & Rud. 477.

becomes of "substantive" rights, when they can thus be subverted by a rule of procedure? Can a lawyer be a leading lawyer, or, indeed, a lesser one, and understand these matters, and remain silent?

There is a way out, and one way only—a knowledge of the fundamental principles of Procedure. "The study of Procedure is a study of Government." It is susceptible of demonstration that the principles of the law are few; that they can be arranged in order and stated in black on white, in small compass. The law in that sense is a little thing. It is a beautiful harmony of principle, but capable of being distorted into an unsightly wreckage of cases.

Let us study its immutable principles, and learn again to reason from them, using the great leading cases as beacon lights. Some suggestions along this line will probably be offered later.

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INFANCY—ESTOPPEL TO PLEAD.

GRAUMAN, MARX & CLINE CO. v. KRIE-NITZ.

Supreme Court of Wisconsin, April 26, 1910.

The rule that an infant may bind himself by his actual fraud, but not by mere conduct or silence when he ought to speak, is an exception to the rule that an infant cannot bind himself by estoppel, and is confined to cases where the infant is in fact developed to the condition of actual discretion, and to cases of actual fraud, and where the contract or transaction is beneficial.

The action was to recover on a promissory note upon which appellant was an accommodation maker. The complaint was duly verified. No answer was served. Judgment by default was taken, in due course. Neither appeared of record indicating that appellant was a minor. Execution was duly issued on the judgment and returned unsatisfied. Several months after judgment, supplementary proceedings were commenced against appellant, whereupon he appeared and secured appointment of a guardian ad litem to represent him and institute and carry on due proceedings to open the default and obtain leave to defend. A motion was duly

made to vacate the judgment. Upon such motion defendant tendered an answer, pleading that he signed the note as an accommodation maker, only, and that he was a minor at the time of so signing and still was such.

The motion was supported by affidavits on defendant's behalf that he, at first, became a guarantor for his codefendant at the request of her husband; that she desired to purchase millinery goods of plaintiff and could not do so without a guarantor of payment therefor; that later, when the indebtedness incurred on the faith of the guaranty, amounting to some \$472, became due, defendant was asked by plaintiff's attorney to settle therefor; that defendant then claimed he was not liable because he was a minor; that, as a result of some negotiations, the claim was settled by the note in suit, signed by defendant as an accommodation maker and a personal note of the principal debtor for the balance.

The affidavits tended strongly to show that the settlement was made, and guaranty surrendered to defendant on the faith of his representation, by conduct, or words that he had arrived at the age of 21 years. Whether he expressly so represented was disputed, the preponderance of proof being in the negative. There was a conflict as to whether defendant represented himself to be of age when the guaranty was signed, but the preponderance of proof was in the negative. The affidavits pretty clearly showed that plaintiff supposed, and had reasonable ground to suppose, defendant was of age when he signed the guaranty and, later, when the note was signed, its agent supposed, and had reasonable ground to suppose he was of age, but in fact that he was not; that no benefits whatever came to defendant, at any time, for signing either guaranty or note; that he paid no attention to the litigation after the summons was served, but left the matter wholly to his codefendant to attend to till several months after judgment, when he was aroused to activity by institution of the supplementary proceedings. He was matured, beyond an ordinary person of his years, at the time he signed the guaranty. He had and was conducting a business of his own and had taken a place in the community as a business man; the appearances being such that one would naturally have supposed he was of age. He was influenced to his attitude, at the time of signing the note, somewhat, because he desired his father not to know that he had been allowing such use of his name.

MARSHALL, J. (after stating the facts as above): The situation, in brief, stating it as favorably for respondent as the moving papers will reasonably permit of, is this: Respondent

and its agent believed, as above indicated, that when appellant signed the guaranty, he was of age, and, so believing, accepted him as security for the payment of the indebtedness afterwards incurred. It did not, at the time the note was given, concede that he was not liable on the guaranty. When the note was signed respondent's agent believed that, if appellant were not of age in the first instance he had arrived at his majority in the meantime. Respondent in the last instance, as in the first, was led to do what it did, by appellant, either by express declaration or otherwise, suggesting that he was of age and, manifestly, for the purpose of inducing the former to so believe. Respondent relied upon such belief in all that it did to enforce collection of the claim up to the time appellant claimed, in the supplementary proceeding, that he was still in his minority. It incurred danger of loss by selling goods on the faith of the guaranty and incurred loss to a considerable amount in reliance upon the note, if he shall be heard, successfully, to claim he was a minor when he signed the paper and when he petitioned for leave to defend against the same notwithstanding the judgment. If he were an adult his laches after service of the summons would justify the refusal to grant relief.

An application to set aside a default, in a case of this sort, notwithstanding the minority of appellant, is addressed to the sound discretion of the court, but such discretion must be guided by the settled policy of the law, that a person under disability is entitled to reasonable opportunity to be heard in court by a qualified representative during his disability, or by himself after the disability shall have been removed. Such exceptions as there are to such policy are so rare that the rule is well nigh universal. So, whether the trial court failed to exercise its discretion, in this instance, either because of misconception, or abused it by a too severe an application, of the law, or by misconceiving the effect of the facts, must be answered from the standpoint of the well-settled policy referred to.

That a minor defendant should be represented by a guardian ad litem, is too familiar to require to be more than stated. It is laid down in the elementary works thus:

"It is an almost universal rule that where an infant is a defendant a guardian ad litem must be appointed for him to conduct the defense. The reason of this rule is plain, for it is evident that the privileges of an infant with regard to contracts and other transactions would be of slight utility if he were liable to be dragged into court and exposed there, unprotected in his ignorance, to contend with

learning and experience. It is to protect him against such danger that the law assigns him a guardian in the suit." Ency. P. & P. 618.

Going back to the guaranty on the note, it is conceded, as the fact is, that the contract of a minor, other than for necessaries, is either void or voidable at his option, exercised within a reasonable time after his coming of age. Such a contract, not for necessaries, is, as a rule, voidable by the minor at his option reasonably exercised, upon his coming of age and restoring the former situation as far as he is reasonably capable of doing so. There is an exception to that, generally recognized by the courts, including our own, of which *Knaggs v. Green*, 48 Wis. 601, 4 N. W. 760, 33 Am. Rep. 838, and *Thormahlen v. Kaepel*, 86 Wis. 378, 56 N. W. 1089, are illustrations. That is this, a minor may, in making a contract beneficial to himself, under some circumstances, preclude himself, by equitable estoppel, from subsequently avoiding it on the ground of his infancy. The basic circumstance rendering that applicable is actual fraud; express representation of capacity to contract, inducing the adverse party to enter into the agreement. Many illustrative cases are cited in the brief of counsel for respondent. The following are a few of them, and others: *Hayes v. Parker*, 41 N. J. Eq. 630, 7 Atl. 511; *Commander v. Brazil*, 88 Miss. 668, 41 South. 497, 9 L. R. A. (N. S.) 1117; *Ostrander v. Quinn*, 84 Miss. 230, 36 South. 257, 105 Am. St. Rep. 426; *Whittington v. Wright*, 9 Ga. 23; *Sanger v. Hibbard*, 2 Ind. T. 547, 53 S. W. 330; *Steed v. Petty*, 65 Tex. 490; *Williamson v. Jones*, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; *Harmon v. Smith* (C. C.), 38 Fed. 482.

An examination of the cited cases will demonstrate that the rule that an infant may bind himself by his actual fraud, but not by mere conduct or silence when he ought to speak, is very guarded. It forms an exception to the one that an infant or other person under disability cannot bind him or herself by estoppel. It is confined to cases where the infant, though under legal discretion, is in fact developed to the condition of actual discretion. It is further confined to cases of actual fraud and where the contract or transaction is beneficial to the minor. The rule being purely of equitable nature, it may be that, in a case of great hardship to the adverse party and substantially the same discretion on the part of the minor as if he were of age, the equity of the law will stand in the way of the latter to prevent such injury by closing the judicial ear to his appeal for assistance to avoid his obligation. But the decided cases do not furnish

illustrations of such extension. However, the precedents would not limit the power of the court to extend the principles of equity where necessary to effect justice.

This court recognized the general rule in *Thormaehlen v. Kaeppel*, *supra*, in these words:

"We suppose, of course, that a court of equity would refuse to relieve an infant of his contract if his own fraud induced the other party to enter into it."

And further, in effect, but if the minor merely fails to impart information of his age, unasked, there being no misrepresentation of fact and no artifice employed to mislead the other party, he is not guilty of that species of fraud which will estop him from pleading his minority to avoid the contract. The court had no need at that point, to deal with the other feature essential to create the estoppel, viz., that the contract must be beneficial to the minor. So one might be misled by reading the court's observation, which was not so guarded as to suggest such essential.

Enough has been said to demonstrate that a minor cannot, unless in some extreme cases of which this is not a type, even by actual fraud, estop himself from pleading his minority to avoid a contract which is not beneficial to him; as in case of his becoming a mere surety or accommodation maker of a promissory note.

The element of actual discretion on the part of the minor, characterized the instant transaction, but not that of beneficial nature to the minor, nor such extreme hardship to the other party as to warrant the doctrine of estoppel being applied. The learned trial court, quite likely, was misled by the general language in *Thormaehlen v. Kaeppel*, *supra*, and by overlooking the closeness with which the doctrine that a minor may estop himself by his fraud from asserting his infancy to avoid his contract, is fenced about: (1) By necessity for actual discretion; (2) necessity for actual fraud; (3) necessity for beneficial nature of the transaction to the minor. Had these essentials been appreciated fully, the application for leave to defend against respondent's claim, notwithstanding the default, would probably have been granted.

True, a judgment rendered against a minor where he is not represented by a guardian ad litem, is not void. Such representation is not jurisdictional. Notwithstanding absence of it the judgment is proof against collateral attack. It can only be avoided by appeal for error, where the minority appears of record, or otherwise by motion or other direct proceeding in the action seasonably resorted to.

This, of course, contemplates jurisdiction obtained by proper service of the summons as required by law. There was such service in this case. While the mere neglect, regardless of the cause of it, the court having jurisdiction to have a minor defendant represented by a guardian ad litem, is not jurisdictional, the rule indicated obtains by the great weight of, though not the universal authority. 1 Black on Judgments, sec. 193, note 34. The federal Supreme Court is in the former class. *O'Hara v. McConnell*, 93 U. S. 150, 23 L. Ed. 840. Some suggestions in authorities the other way are regarded as rather inconsequential.

So appellant took the proper course to avoid the effect of the judgment. He could not have reached the infirmity by appeal, since it does not appear of record. There is no question but what his motion was seasonably made as to the mere element of time. There was no element of actual fraud which stood in the way. Mere acquiescence, while under disability, was not sufficient to justify denying the motion. True, the court might, for sufficient equitable considerations in such a case, deny relief. But, the policy of the law to afford a minor a day in court, properly represented by guardian ad litem, or after removal of the disability to be heard, is so general that something of an extraordinary character would be required to create an exception; something far more serious than such mere inconvenience and cost of litigation to the adverse party, as in this case.

It is not to be understood that judgments characterized by irregularity, as in this case, can always be set aside either during disability or after it has been removed. In case, notwithstanding the irregularity, the minor suffered no substantial injustice, relief is not, necessarily, grantable. That, of course, would not include a case like this where there was no enforceable liability in the first instance.

It follows that the order appealed from must be reversed, and the cause remanded with directions to grant appellant's motion.

So ordered.

NOTE.—*Estoppel to Disaffirmance Based on Misrepresentation of Age.*—The principal case has respectable authority in its support, but it is in recent cases, which we think ignore the fact, that, outside of legislative endowment of infant with capacity to contract, he should be regarded as not being able to affect any other contract either directly or indirectly. We refer to a few of numerous cases on this subject. In *Commander v. Brazile*, *supra*, the Mississippi Supreme Court went upon the theory that though the old cases ruled, that the minor's misrepresentation as to his age would not establish

his contract against a plea of infancy, they were in unison upon the point that the creditor had a remedy—some saying in tort and others in equity. And the court is careful to thus limit its decision in holding, that a minor cannot plead infancy to an executed contract, when it has been induced by fraud, in making his creditor believe he is of age. The court says: "We do not hold that an executory contract may be enforced against an infant who falsely represents himself to be of age, unless some damage has been done to the party with whom he contracts. We do not hold that an infant is estopped by his deed merely. We do not hold that any sort of a contract may be enforced against an infant at any time on account of his false assertion that he is of age, unless the age and appearance may well deceive the person with whom he deals. We do hold, however, that when a minor has reached that stage of maturity which indicates he is of full age and enters into a contract, falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped, to deny that he is not of age when the obligation of the contract is sought to be enforced against him." In its last analysis we think the Mississippi court admits, that it is correcting what it deems an injustice in a rule of law, because the legislature has failed of its duty in this respect. The Commander case is a distinct advance in Mississippi decision, which appears by *Ostrander v. Quin*, *supra*, merely to have gone to the extent of holding, that a mortgage is only proof against avoidance by a plea of infancy, where its giving was induced by misrepresentation as to age, where the money loaned thereon is not tendered back. We might conceive that the tender should include legal interest but not a contract rate above that, and that usurious interest might be avoided very easily through a tender. In other words, these are refinements in the judicial rule, which has grown up, as well as there were in the rule which it supersedes.

In *Ingram v. Ison*, 26 Ky. Law Rep. 48, 80 S. W. 787, a sale of land was sustained against an action to set aside the deed, and while the court quotes from a former Kentucky case that: "Neither infancy nor coverture can excuse parties guilty of fraudulent concealment or misrepresentation," yet the court seemed to be searching the record for other grounds to rest its conclusion upon, and among others, it found proof of ratification after the infant attained his majority.

In *Damron v. Com.*, 110 Ky. 268, 61 S. W. 450, 96 Am. St. Rep. 453, Kentucky decision was cited to the effect, that an infant must restore the property which he obtains in a contract before he can avoid it is the universal rule where he has been guilty of fraud. *Petty v. Roberts*, 7 Bush. 411. Then that principle is extended to his contract of suretyship entered into under like circumstances. We doubt, however, whether the rule about restoration is as stated. Restoration of benefits is the rule where such is in the power of infant, but we do not know of restoration being an absolute condition to disaffirmance where fraud by infant inheres in the contract. See 70 Cent. L. J. 434, and *Ridgeway v. Herbert*, *infra*.

In *Ridgeway v. Herbert*, 150 Mo. 606, 51 S. W.

1040, 73 Am. St. Rep. 464, it appears, that the minor making the deed represented he was of age when he was not, but he believed he was of age. The court said: "The deed of a minor is avoidable at his option under certain equitable restrictions when he comes of age, even though he may have represented himself as of age when he made the deed, and thereby misled the other party to his disadvantage. A minor is no more responsible under the circumstances for his representations than he is for his deed. * * * When one on coming of age seeks to avoid his deed made when a minor, he must act promptly, and, if he has the consideration that was paid him for the deed, he must restore it; but, if during his minority, the consideration which he received has been wasted, he may avoid the deed without making restitution." But, as we have said, the minor in this case believed his representation was true.

This case follows *Craig v. Van Bebber*, 100 Mo. 584, 18 Am. St. Rep. 633, where a married woman, 16 years of age executed a deed and was allowed to recover without restoring the consideration. In Missouri a woman attains her majority at 18. There is no suggestion that she was in any way ignorant of her true age, but there was no claim about her representing what her age was, or that grantee was misled. The question of fraud was not discussed.

It seems to be well settled that mere dealing as an adult does not create an estoppel. *Miller v. Blanke*, 38 L. T. 527; *Carpenter v. Pridden*, 40 Tex. 32; *Folds v. Allardt*, 35 Minn. 488. Notwithstanding that the minor appears and is believed by the other party to be of full age. *Buchanan v. Hubbard*, 96 Ind. 1. And many cases—indeed, they seem without exception—show that at law the same holds where there is misrepresentation relied on by the other party, as to age of the infant. See note, 18 Am. St. Rep., pages 633-634, that is to say the older cases are all in accord on this subject.

It has been held that the rule of law will not be departed from in equity where there is mere non-disclosure of minority. *Baker v. Stone*, 136 Mass. 405; *Alvey v. Reed*, 115 Ind. 148, 7 Am. St. Rep. 418.

In *Sims v. Everhardt*, 102 U. S. 300, there was a question of disaffirmance of a deed and Justice Strong said: "All that is claimed is that when she made her deed she asserted she was of age and competent to convey. * * * In regard to this there can be no doubt founded either on reason or authority. Without spending time to look at the reason, the authorities are all one way. An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity. A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in his deed. An assertion of estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed." This seems to us to knock the props from under the fraud theory, as that only rests on a verbal declaration of what has been impliedly asserted in writing.

In *Loan Assn. v. Block*, 119 N. C. 323, 25 S. E. 975, the opinion thus speaks: "But it is in-

sisted that because she obtained money by false representations as to her age, she was estopped from denying her obligation to pay. If the courts should sanction this doctrine, the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened up for reckless youths to evade the law by lying. The courts would thereby put a premium upon falsehood and hold out the temptation to infants and to others, who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander and the other to extort the patrimony intended to prepare a child for future usefulness."

If we take this case and Sims v. Everhardt, together, we have a pretty good basis for denying any effect *contractually* to false representations. But there seems to us another reason, and that is one that overcomes the tort theory. If an infant cannot contract, he can do nothing tortiously in respect to a contract. He may get hold of one's property wrongfully but not *via* contract as contract, because he can make no contract. His tort is, therefore, entirely dissociated from contract. Therefore, also, he can commit no fraud of a contractual sort. We think the argument by the North Carolina court very strong, as showing the whole policy of the law is exposed to a kind of evisceration, if that is recognized which the court condemns.

Besides all this, we see that the legislature looks after infants' contracts and allows them a limited capacity. When courts extend that, they seem very flagrantly to pass beyond their province.

In Kirkham v. Wheeler Osgood Co., 39 Wash. 415, 81 Pac. 869; Sims v. Everhardt, *supra*, is followed, and the age of the minor shows the wisdom of its rule, and also exemplifies the North Carolina reasoning. In the Kirkham case the employer sought to avoid liability because a minor under fourteen years of age represented he was of such age. This shows that the *ultima Thule* of the misrepresentation theory might take in the prattling of babes.

For right to disaffirm during minority, see 69 Cent. L. J. 433, and necessity of returning benefits, id. 434.

C.

JETSAM AND FLOTSAM.

JUSTICE BREWER'S SOLEMN WARNING AGAINST PROCEEDINGS IN CAMERA.

The last utterances of any man are highly cherished; so should the words of a public servant be regarded by the people he has served.

Among the last great utterances of Justice Brewer was his great address at Far Rockaway, New York, in which he severely condemned the practice of granting decrees of divorce in camera, having reference, evidently, to the procedure in the famous Astor divorce case in New York City.

Justice Brewer said: "I believe that it is better to have no divorce than divorce obtained by secret processes."

A judge who allows himself to become a party to a secret judicial proceeding leading to

a final judgment is no less excusable than the lawyer who represents his ability to secure such a procedure for his client. In the latter case the courts have disbarred attorneys for making such representations (People v. Goodrich, 79 Ill. 148; People v. McCabe, 18 Colo. 186), on the ground that such representations reflected on the integrity of the court.

What shall we say, then, of the judge who deliberately permits such proceedings to take place, who invites public suspicion as to the motives influencing his actions, and who thus impairs the confidence of the people in the integrity of the judiciary?

The condemnation of the profession should rest upon such a judge.

FAILURE TO RAISE HAND WHILE TAKING OATH.

A school teacher was convicted of perjury for having falsely made a statement under oath to procure a license to marry a feminine pupil under the requisite age. In State v. Day, 121 Northwestern Reporter, 611, his contention was that, although he had gone through the other ceremony usual in taking an oath, he had neglected to raise his hand. It having been convincingly shown that appellant knew the girl was less than 18 the fact that he knew the application contained the statement that she was over that age, and the fact that he signed it deliberately knowing it to contain such statement, dispensed with an exact following of the statutory form of oath. The Minnesota Supreme Court decided that, the particular formality never having been regarded as important, the essential thing was that the party taking the oath should go through some declaration or formality before the officer which indicates to him that the appellant consciously asserts or affirms the truth of the fact to which he testifies. Conviction affirmed.

HUMOR OF THE LAW.

In these days, when trial by newspaper is fast taking the place of trial by jury, it is encouraging to meet with any evidence that the editorial mind takes a large and judicial view of social questions. Here, for instance, is a Missouri journal which lays down a broad principle, the equity of which few will be found to dispute:

"If you are a married man," this editor declares, "your wife can compel you to support her. If you are not, she can't."

The former conclusion may be good law, although the enforcement of which is sometimes attended with great practical difficulties.

As to the second relation our observation forces a contrary conclusion. It costs more and besides it doesn't require action by the courts to effect maintenance.—Ohio Law Bulletin.

"What's your name, prisoner?"

"Mah name's Jashua, Judge."

"Joshua, eh?" said the judge as he rubbed his hands. "Are you that same Joshua spoken of in Holy Writ—who made the sun stand still?"

"No, Judge," was the hasty answer, "'twan't me. Ah am de Jashua dat made de moon shine."—Congressman Clayton of Alabama.

WEEKLY DIGEST.

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1. Abatement and Revival—Revival of Action.—Where the subject-matter of an action was real property, and the heirs of the deceased owner were parties, a formal revivor because of the death of the owner of an estate by courtesy, who was a coparty was not necessary.—*Arnett v. Williams*, Mo., 125 S. W. 1154.

2. Action—Splitting Causes of Action.—A party cannot split up his cause of action.—*J. J. Smith Lumber Co. v. Sisters of Charity of the Blessed Virgin Mary*, of Dubuque, Iowa, 125 N. W. 214.

3. Adjoining Landowners—Care Required in Making Excavations.—An adjoining lot owner, excavating for the erection of a building, is only required to exercise ordinary care in prosecuting the work to avoid injury to the adjoining lot.—*Flanagan Bros. Mfg. Co. v. Levine*, Mo., 125 S. W. 1172.

4. Bankruptcy—Act of Bankruptcy.—Petition by a corporation to the state court for a receiver held to show that it was insolvent, and hence such application constituted an act of bankruptcy.—*In re Electric Supply Co.*, U. S. D. C., S. D. Ga., 175 Fed. 612.

5.—Ancillary Jurisdiction.—The respective district courts of the United States sitting in bankruptcy have ancillary jurisdiction to make orders and issue process in aid of proceedings pending in another district.—*In re Elkus*, U. S. S. C., 30 Sup. Ct. 377.

6.—Ancillary Proceedings.—The federal district court has jurisdiction to grant an order for examination of residents of the district on application of a trustee in bankruptcy appointed in proceedings in another district.—*In re Elkus*, U. S. S. C., 30 Sup. Ct. 377.

7.—Attachment.—On the bankruptcy of the plaintiff in an attachment suit and the refusal of the trustee to continue the suit, a surety on the attachment bond may be allowed to continue it in the bankrupt's name for his own protection.—*Bluegrass Canning Co. v. Steward*, U. S. C. C. of App., Sixth Circuit, 175 Fed. 587.

8.—Attorney's Fees.—Attorneys, who filed a petition in involuntary bankruptcy for creditors, which was defective and insufficient to warrant an adjudication, which was made on a second petition by other creditors, are not entitled to an allowance of fees from the estate.—*In re Fischer*, U. S. C. C. of App., Second Circuit, 175 Fed. 581.

9.—Chattel Mortgages.—A chattel mortgage by a bankrupt, withheld from record under an agreement with the mortgagee to protect the mortgagor's credit, held invalid only as to creditors who extended credit in the meantime, relying on the bankrupt's ownership of the property.—*Mattley v. Wolfe*, U. S. D. C., D. Neb., 175 Fed. 619.

10.—Compelling Production of Books.—A bankruptcy court has power on petition and rule to show cause to compel delivery to the trustee of records and stock books of the bankrupt corporation.—*Babbitt v. Dutcher*, U. S. S. C., 30 Sup. Ct. 372.

11.—Jurisdiction of State Court.—Jurisdiction of a state court, if any, to administer a corporation's assets by a receiver in insolvency, held not to prevent creditors within four months from proceeding to have the assets administered in bankruptcy.—*In re Electric Supply Co.*, U. S. D. C., S. D. Ga., 175 Fed. 612.

12.—Landlord's Claim for Rent.—A landlord's lien for rent is superior to the claims of general creditors of the bankrupt in the administration of the latter's estate in bankruptcy.—*In re V. D. L. Co.*, U. S. D. C., N. D. Ga., 175 Fed. 635.

13.—Lien Claims.—Whenever a lien is valid and enforceable in bankruptcy, depends on the law of the state.—*Mattley v. Wolfe*, U. S. D. C., D. Neb., 175 Fed. 619.

14. Banks and Banking—Powers of National Bank.—A national bank, under an agreement with its debtor that he will devote to his debt a part of the proceeds of a loan from another bank guaranteeing its payment at maturity, must account to the lending bank the sum which it receives for its own use under the agreement.—*Citizens' Central Nat. Bank of New York v. Appleton*, U. S. S. C., 30 Sup. Ct. 364.

15. Bankruptcy—Priorities.—A landlord's lien is one having priority under the state laws and is not displaced by the tenant's bankruptcy.—*In re Burns*, U. S. D. C., S. D. Ga., 175 Fed. 633.

16.—Title of Trustee.—A trustee in bankruptcy is not a bona fide purchaser for value so as to bar the reformation in equity for mistake of a contract made by the bankrupt.—*Zartman v. First Nat. Bank*, U. S. S. C., 30 Sup. Ct. 368.

17.—What Are Assets.—The advantage derived from a mistake by a bankrupt when reducing to writing a contract made by him is not an asset in the hands of his trustee in bankruptcy.—*Zartman v. First Nat. Bank*, U. S. S. C., 30 Sup. Ct. 368.

18.—Who May Be Involuntary Bankrupt.—A corporation conducting hotels at various points held not engaged principally in trading or mercantile pursuits so as to be liable to an involuntary adjudication in bankruptcy.—*Toxaway Hotel Co. v. J. L. Smathers & Co.*, U. S. S. C., 30 Sup. Ct. 263.

19. Banks and Banking—Power to Purchase Land.—An objection that a corporation organized under the national banking act has no ca-

pacity to purchase land can only be raised by the federal government.—*De Witt County Nat. Bank v. Mickelberry*, Ill., 91 N. E. 86.

20. Bills and Notes—Accommodation Indorser.—An accommodation indorser is discharged by failure to give him notice of non-payment, as required by Negotiable Instrument Act.—*Mechanics' & Farmers' Sav. Bank v. Katterjohn*, Ky., 125 S. W. 1071.

21. Bona Fide Purchasers.—Where fraud or illegality in the execution of a note is set up as a defense, the holder has the burden of showing his right to protection from such defense because a good-faith purchaser.—*Hill v. Ward*, Ind., 91 N. E. 38.

22. Bonds—Validity.—While the requirements of the statute must be strictly followed in a statutory bond, a variance or omission, to be fatal, must be material.—*Waterous Engine Works Co. v. Village of Clinton*, Minn., 125 N. W. 269.

23. Brokers—Right of Owner to Sell Property.—An owner employing a broker to procure a purchaser held to retain the right to himself dispose of the property.—*Glibert v. McCullough*, Iowa, 125 N. W. 173.

24. Wrongful Revocation of Authority.—The owner of land, who wrongfully revoked the authority of the broker to sell, and then sold to the person procured by the broker, is liable to the broker for such damages as arose from such revocation of his agency.—*Hancock v. Stacy*, Tex., 125 S. W. 884.

25. Burglary—Want of Consent of Owner.—While the want of consent of the owner of property stolen may be proved in a prosecution for burglary by circumstantial evidence, such evidence cannot be resorted to, if positive or direct proof is available.—*Brown v. State*, Tex., 125 S. W. 915.

26. Carriers—Negligence.—That a railway took steps to prevent a repetition of an accident occasioned by a passenger falling into the space between a car and the platform was not evidence of prior negligence.—*Anshen v. Boston Elevated Ry. Co.*, Mass., 91 N. E. 157.

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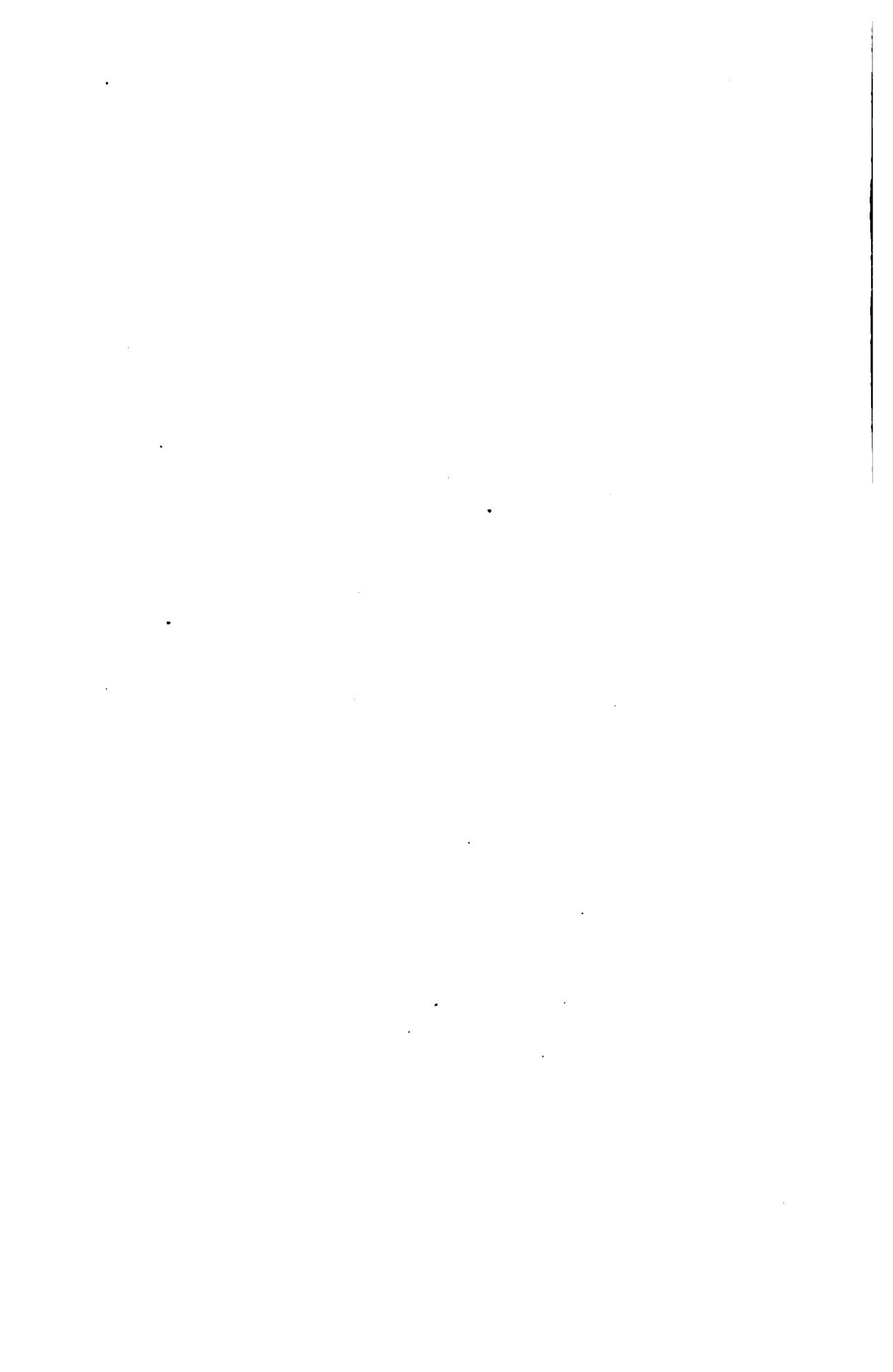
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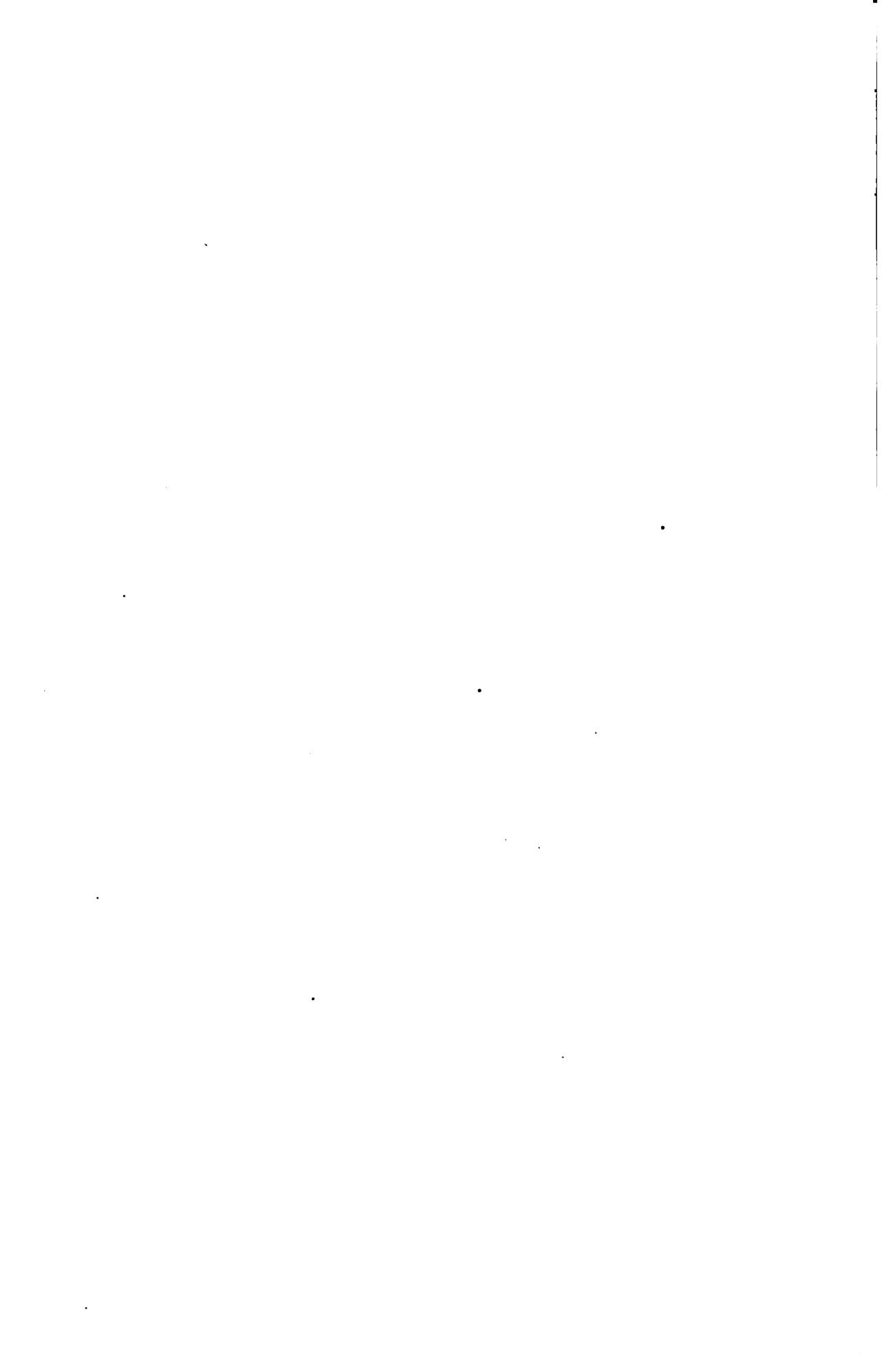
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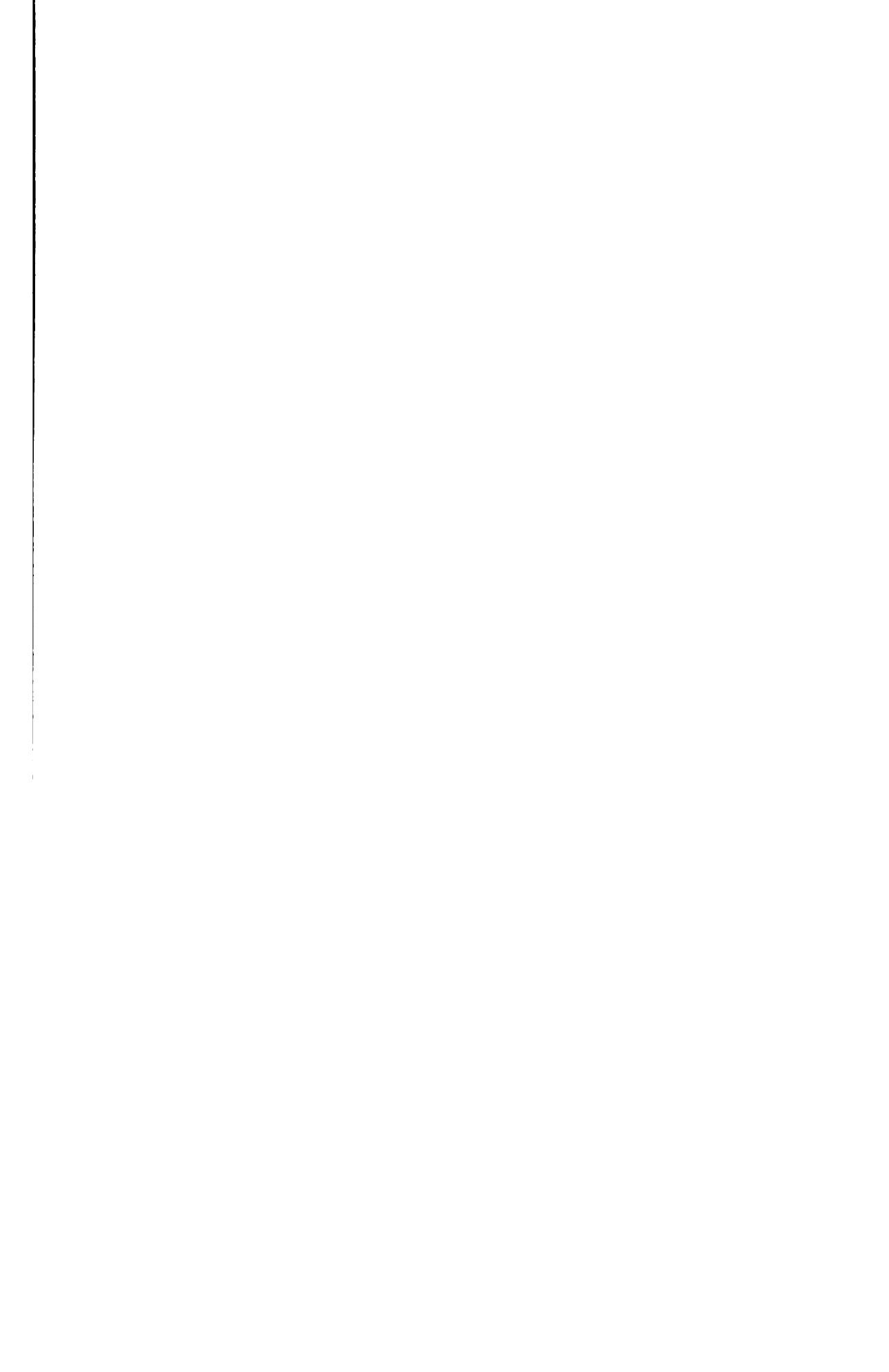
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